

Before the
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In re

DISTRIBUTION OF CABLE
ROYALTY FUNDS

DISTRIBUTION OF SATELLITE
ROYALTY FUNDS

CONSOLIDATED DOCKET NO.
14-CRB-0010-CD/SD
(2010-13)

WRITTEN DIRECT STATEMENT
OF THE SETTLING DEVOTIONAL CLAIMANTS

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Pursuant to 17 U.S.C. § 803(b)(6), Section 351.4 of the rules of the Copyright Royalty Judges, 37 C.F.R. § 351.4, and the Judges’ December 22, 2017 Order Consolidating Proceedings and Reinstating Case Schedule, the Settling Devotional Claimants (“SDC”) submit their Written Direct Statement in connection with the above-referenced proceeding to allocate the 2010, 2011, 2012, and 2013 cable and satellite royalty funds for the Devotional category (the “2010-2013 Funds”) between the SDC and claimants represented by Multigroup Claimants (“MGC”). The purpose of this memorandum is to summarize the written testimony of the SDC, to designate prior testimony, and to state the SDC’s Distribution Phase claim.

I. SUMMARY OF THE TESTIMONY

1. Testimony of John S. Sanders

John Sanders is a principal in Bond & Pecaro, Inc., a Washington, D.C.-based firm that specializes in the appraisal of communications and media assets. Mr. Sanders has actively participated in the appraisal of more than 3,000 communications and media businesses. Much of his work has focused on the television and cable industries and the appraisal of intangible

assets, such as syndicated and feature film television programming, customer and subscriber-based assets, advertiser relationships, and customer lists. He has also testified on behalf of the SDC in several copyright royalty proceedings.

Mr. Sanders will provide a summary of the SDC claimants and programs in this proceeding. He will also offer his professional opinions regarding the appropriate methodology for determining the relative market value of SDC and MGC-represented programming and the allocation of shares among the valid royalty claimants.

2. Testimony of Dr. Erkan Erdem

Dr. Erdem is a Managing Director at KPMG LLP in the Economic and Valuation Services (“EVS”) practice. He received a Bachelor of Science in Mathematics and Bachelor of Arts in Economics from Koç University in Istanbul, Turkey in 2000, and subsequently earned a Ph.D. in Economics from The Pennsylvania State University in 2006. Prior to joining KPMG, he worked as an antitrust economist for Bates White, LLC and an economist for IMPAQ International, research consulting firms. Dr. Erdem has an impressive background providing expert analyses on economic and statistical matters. He has also previously testified on behalf of the SDC in the 2004-2009 Cable Royalty Funds distribution proceeding and the Allocation Phase of the 2010-2013 Cable Royalty Funds proceeding before the Copyright Royalty Board.

Dr. Erdem will discuss the most appropriate methodologies for measuring the relative market value of a program and the allocation of the 2010-2013 Funds among the SDC and MGC-represented claimants within a zone of reasonableness. As part of this discussion, Dr. Erdem will explain why the SDC shares resulting from his methodology using Nielsen’s Reports on Devotional Programs should represent a floor, not a ceiling, based on a sensitivity analysis he conducted using newly acquired supplemental Nielsen data.

II. DESIGNATED TESTIMONY

The SDC designate the following testimony:

In the Matter of Phase II Distribution of the 2004-2009 Cable Royalty Funds and 1999-2009 Satellite Royalty Funds, Docket Nos. 2012-6 CRB CD and 2012-7 CRB SD, Testimony of Toby Berlin, President and Founder of School of Toby, Inc., a media consulting business. The SDC designate the entirety of Ms. Berlin's written and oral testimony. Copies of Ms. Berlin's written testimony and the transcript of the direct, cross, and redirect examinations of Ms. Berlin are attached hereto.

III. SDC'S DISTRIBUTION PHASE CLAIM

Based on the testimony of their witnesses and other testimony they anticipate will be presented in this case, the SDC seek the following percentage shares of the 2010-2013 Funds:

Year	SDC Cable Share	SDC Satellite Share
2010	77.1%	75.3%
2011	82.6%	88.3%
2012	84.8%	90.7%
2013	89.1%	97.7%

Pursuant to 37 C.F.R. § 351.4(b)(3), the SDC reserve the right to amend the requested award based on evidence in this proceeding.

Respectfully submitted,

SETTLING DEVOTIONAL CLAIMANTS

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December 29, 2017

Counsel for Settling Devotional Claimants

CERTIFICATE OF SERVICE

I, Matthew J. MacLean, hereby certify that a copy of the Settling Devotional Claimants' Written Direct Statement was sent via Federal Express, and sent electronically, this December 29, 2017 to the following:

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/s/ Matthew J. MacLean
Matthew J. MacLean

**Before the
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In the Matter of)	
)	
DISTRIBUTION OF 2010-2013 CABLE ROYALTY FUNDS)	DOCKET NO. 14-CRB-0010-CD (DISTRIBUTION PHASE)
)	
DISTRIBUTION OF 2010-2013 SATELLITE ROYALTY FUNDS)	DOCKET NO. 14-CRB-0011-SD (DISTRIBUTION PHASE)
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Testimony of John S. Sanders

December 22, 2017

Written Direct Statement of the SDC (Distribution Phase)

Testimony of John S. Sanders

My name is John S. Sanders and I am testifying on behalf of the Settling Devotional Claimants (“SDC”)¹ in this proceeding.² I have been requested to make a fair determination of the *relative fair market values* of sets of particular Devotional television programs claimed by the parties in the 2010-2013 Cable and Satellite Royalty Distribution Proceedings. For the purposes of this analysis, “fair market value” is defined as the price in cash or cash equivalents between a willing buyer and a willing seller, both being fully informed and neither being under compulsion. Relative fair market value is a similar concept, but is expressed as a percentage rather than a dollar amount. The purpose of this analysis is to divide reasonably the royalty pool between SDC and Multigroup Claimants (“MGC”).

¹ The Settling Devotional Claimants are comprised of the following entities: Amazing Facts, Inc., American Religious Town Hall Meeting, Inc., Catholic Communications Corporation, Christian Television Network, Inc., The Christian Broadcasting Network, Inc., Coral Ridge Ministries Media, Inc., Cornerstone Television, Inc., Cottonwood Christian Center, Crenshaw Christian Center, Crystal Cathedral Ministries, Inc., Family Worship Center Church, Inc. (D/B/A Jimmy Swaggart Ministries), Free Chapel Worship Center, Inc., In Touch Ministries, Inc., It Is Written, Inc., John Hagee Ministries, Inc. (aka Global Evangelism Television), Joyce Meyer Ministries, Inc. (F/K/A Life In The Word, Inc.), Kerry Shook Ministries (aka Fellowship of the Woodlands), Lakewood Church (aka Joel Osteen Ministries), Liberty Broadcasting Network, Inc., Living Word Christian Center, Living Church of God (International), Inc., Messianic Vision, Inc., New Psalmist Baptist Church, Oral Roberts Evangelistic Association, Inc., Philadelphia Church of God, Inc., RBC Ministries, Rhema Bible Church (aka Kenneth Hagin Ministries), Ron Phillips Ministries, St. Ann's Media, The Potter's House Of Dallas, Inc. (d/b/a T.D. Jakes Ministries), Word of God Fellowship, Inc., d/b/a Daystar Television Network, Billy Graham Evangelistic Association, and Zola Levitt Ministries.

² The distribution of programming royalties for distant signals retransmitted on cable television and satellite systems has historically been based upon a two-phase process. In Phase I, now known as the Allocation Phase, the royalty pool is allocated to eight broad program categories: program suppliers, joint sports claimants, commercial television claimants, public television claimants, devotional claimants, Canadian claimants, music claimants, and National Public Radio. In Phase II, now known as the Distribution Phase, the contents of each pool are then divided among each of the constituent programming claimants. In other words, the Phase I procedure allocates the royalty pool into reasonably homogeneous categories, whereas the Phase II procedure distributes the proceeds of that category based upon the programming it contains. In the interest of economy, the Judges have now consolidated these phases into a single Docket with an Allocation Phase (formerly, Phase I) and a Distribution Phase (formerly, Phase II). The focus of this analysis is the Distribution Phase.

I. Professional Background - *Work and Education History*

I have been a Principal at the Washington, DC-based firm Bond & Pecaro, Inc. since 1986. Bond & Pecaro, Inc. specializes in the appraisal of communications and media assets. Prior to that, I was a manager with Frazier, Gross & Kadlec, Inc., where I worked from 1983 to 1986. Frazier, Gross & Kadlec, Inc. also specialized in the valuation of media and communication assets.

During my career, I have actively participated in the appraisal of more than 3,000 communications and media businesses. Much of my work has been focused on the television and cable industries and the appraisal of intangible assets such as customer and subscriber-based assets, syndicated and feature film television programming, advertiser relationships, and customer lists.

I graduated from Dickinson College with a B.A. Cum Laude (Honors) and a double major in International Studies and Economics. I received an M.B.A. from the Colgate Darden Graduate School of Business at the University of Virginia. I also hold the Accredited Senior Appraiser (“ASA”) designation in the specialty of business valuation from the American Society of Appraisers. I am a member of the Media Financial Management Association (“MFM”) and was elected to its Board of Directors in 2017. The MFM is a non-profit professional organization dedicated primarily to providing continuing education on accounting, valuation, compliance, and related matters to managers and media financial executives. According to the MFM, its “1,200 active members represent the top financial, general management, IT, internal audit, human resources, and other media management personnel from major television networks, network affiliates, radio stations, cable programming networks, cable MVPDs, digital, out-of- home and newspaper/print outlets

throughout the U.S. and Canada.”³ Additional information on my background is provided in Appendix A.

Since 1983, I have worked on a regular basis for media companies such as Adelphia, Cable One, CBS, Comcast, Fox, Gannett, Nexstar, Sinclair, Time Warner, Tribune and many others to perform economic and valuation analyses. These analyses are employed for a variety of purposes including, but not limited to, financial and tax reporting, mergers and acquisitions, financing, litigation support, music rights fees and fixed asset management. I have also filed testimony in the 1998-1999 Cable Royalty Distribution Proceeding (Dkt. No. 2008-1 CRB CD 1998-1999 (Phase II)) in the Devotional claimant category on behalf of the SDC, as well as in the 2004-2009 Cable and 1999-2009 Cable Royalty Distribution Proceedings. Additionally, I have provided written testimony in the Allocation Phase of this 2010-2013 proceeding.

II. Primary Materials Considered

In order to establish a comparative assessment of the relative fair market values of MGC and SDC programming, I reviewed the decision of the Copyright Royalty Judges in the 2000-2003 Phase II Cable Royalty Distribution Proceeding and the 2004-2005 Phase I Cable Royalty Distribution Proceeding. I also reviewed the 2000-2003 written direct case testimony of witnesses for SDC and the Motion Picture Association of America-represented Program Suppliers (“MPAA”). The witnesses for SDC were Dr. William Brown and Alan Whitt, and for MPAA were Marsha Kessler, Paul Lindstrom, Jonda Martin, Kelvin Patterson, and Dr. Jeffrey Gray. I also reviewed the transcripts of their testimony. In addition, I have reviewed the direct cases and written testimony in the 1999 Phase II Cable Royalty Distribution Proceeding as well as the 1999-2009 Satellite and 2004-2009 Phase II Cable Royalty

³ <http://www.mediafinance.org/overview>.

Distribution Proceedings. I have also reviewed expert reports prepared in connection with this matter and prior Copyright Royalty cases by Erkan Erdem, Ph.D. (“Dr. Erdem”) and Toby Berlin (“Ms. Berlin”). Furthermore, I had access to and considered Cable Statement of Accounts prepared by Cable Data Corporation, programming data from Tribune Media Services, and Nielsen Media Research (“Nielsen”) Reports on Devotional Programs (“RODP”).

Appendix B is a summary listing of SDC cable claimants in this proceeding, the titles they claim, and the years in which they have made claims. Each of the SDC claimants, through their representatives, sent an email confirming the SDC programs.

The SDC satellite claimants are identical with the following exceptions:

1. Coral Ridge Ministries Media, Inc. is not a satellite claimant in 2013.
2. Oral Roberts Evangelistic Association, Inc. is not a satellite claimant in any year.

III. Relevance of Audience Measurements for Establishing Relative Fair Market Values for SDC and MGC Programming

Over the course of nearly thirty years providing valuation assessments in connection with media and communications, I have looked at a wide range of industry criteria for assessing program valuation. For the purpose of providing testimony to assist in addressing the task of the Copyright Royalty Judges in the instant proceeding, namely to allocate shares of compulsory royalties collected by the Copyright Office from cable and satellite systems for the retransmission of the SDC Devotional programs and MGC-represented Devotional programs on broadcast signals on a distant basis, I based my testimony on my professional experience in valuing content, on the Judges’ 2000-2003 Phase II Final Determination and the expert reports of Mr. Erdem and Ms. Berlin. To allocate reasonably the available funds between SDC and MGC in this proceeding, it is my opinion that audience measurements relying on surveys conducted by Nielsen, together with data from the Copyright Office

records, compiled by CDC, are the best available tools to determine shares.

One of the reasons that cable and satellite system operators value Devotional programming as a category is that it appeals to a class of potential subscribers who are not necessarily captured by other programming, like sports or movies, for instance.

The programs claimed within the category of Devotional programming are directed predominantly to a Christian audience, and can therefore be thought of as homogeneous in terms of the subscriber base to which they are likely to appeal. In my opinion, where programs are homogeneous, the most salient factor to distinguish them in terms of subscribership is the size of the viewing audience. A religious program with a larger audience is more likely to attract and retain more subscribers for the cable system operator, and is therefore of proportionately higher value. Nielsen ratings data is the currency of the broadcast, satellite and cable industries, and it is generally regarded as the most reliable available measure of audience size.

I reviewed the testimony of Ms. Berlin, which was prepared in connection with the 1999-2009 Satellite and the 2004-2009 Cable Phase II royalty proceedings. Ms. Berlin's testimony validates the foregoing and demonstrates the importance of ratings data to determine the relative value of certain programs when cable and satellite companies are developing their channel offerings.

For the years at issue in these proceedings, Nielsen utilized two categories of ratings data: diary data collected during the four "sweep" months, and metered data collected year-round, but only in a limited number of markets and geographical areas. Although metered data can give more up-to-date information where it is available, and is frequently cited for programs with large national audiences, diary data is often regarded by the industry as being more informative and, therefore, a better measure of value. This is true because diary data is collected from all markets,

whereas metered data is collected only from certain markets and a sample of geographical areas, and because diary data utilizes far more households than metered data, and is therefore regarded as a more accurate and granular measure, particularly for programs with comparatively low viewing levels or in smaller markets. Additionally, diary data likely provides a better measure as to what viewers actually value, because it shows what viewers say they were actually watching, rather than simply whether the television was on a particular channel.

IV. Role of Distant Viewing Signals in the Cable Television Industry

The distant signals covered by this proceeding represent a small component of the program offerings of cable and satellite television companies to their subscribers. While between the late 1970s through the 1990s, distant signals were useful to attract and keep cable subscribers, cable subsequently evolved into a mature business with hundreds of available channels to provide subscribers. Satellite television companies gained the ability to carry local programs under Section 119 of the Copyright Act in 1999. Cable and satellite television operators determined that it is still beneficial to maintain distant signal offerings, principally because enough subscribers watched the programs on the channels and the operators were concerned that dropping signals could adversely affect the appeal of cable system services to subscribers.

In the context of distant signals, cable and satellite operators pay on a compulsory basis for the right to carry the entire broadcast day of a distant over-the-air television channel. As such, while cable and satellite operators give consideration to specific programs on a local television channel in making a decision as to whether or not to carry it on a distant signal basis, there are no transactions involving specific programs.

For this reason, there is no “free market” for the purchase of the rights to copyrighted

programs broadcast in distant markets. If there were, it would be a relatively simple matter to sum up the amounts paid by cable and operators in individual arms-length transactions for programs received from distant signals in order to determine the relative fair market value of programming provided by particular groups of claimants.

Such an approach is not possible because transaction data regarding individual distant-signal programs is not available. It is necessary for an appraiser to develop an alternative methodology to determine the relative fair market value of Devotional programs carried over distant signals. Fortunately, ratings data is available from widely accepted organizations like Nielsen. Local viewing data is routinely employed in the broadcasting and pay television industries to facilitate a multitude of practical decisions, ranging from pricing advertising and determining the cost of syndicated programs to establishing the value of a pay television network and measuring the payback on a capital investment. As the Judges determined in the 2000-2003 case, local viewing data, when measured with distant signal subscribership information, can be a surrogate for viewing of content on a distant basis. Except for special studies ordered by the Motion Picture Association of America (“MPAA”) in other royalty cases, there is no readily accessible information about viewership on a distant basis.

A notable exception to the requirement that cable and satellite operators retransmit distant signal programming precisely as broadcast locally must be mentioned. The exception is WGN America (“WGNA”), the most widely carried “superstation,” whose local signal is WGN-TV, Chicago, Illinois.⁴ By virtue of widespread carriage on DirecTV, DISH, and thousands of cable systems across the country and its manner of delivery, WGNA has established a practice of substituting for some of its local programming at the satellite uplink, thereby

⁴ In 2016, WGNA ceased to be broadcast as a “superstation” and was transformed into a basic cable network.

creating a different programming package for pay television operators and their subscribers than is available to TV viewers of WGN-TV in Chicago. This disparity has a corollary for several of the compulsory license program categories, because WGNA substitutes a substantial number of programs for certain local fare. As a result, many religious programs appear on WGNA, but are not telecast by WGN-TV at the same time, and are thus not compensable in this proceeding. In other words, while religious programming constitutes an important core of WGN-TV's and WGNA's broadcast day, and serves a particularly important niche audience, the bulk of religious programming retransmitted by WGNA is not compensable under the compulsory licensing rules.

V. Nielsen Reports on Devotional Programs

In its data reporting on viewing of religious television programming, Nielsen produced, until July of 2013, a quarterly report called Report on Devotional Programs (previously defined as "RODP"). These reports select a substantial, but not exhaustive, list of religious programs, and provide detailed data on the viewing of the programs both in local markets and nationally.

Nielsen imposes restrictions on the Devotional programs and stations that are included in the quarterly RODPs. These include the following:

- a. The program must be taped or on film and available on a market-by-market basis.
- b. It must be broadcast in at least five Nielsen Station Index ("NSI") markets.
- c. It must be scheduled on a reportable commercial television station.
- d. It must at the same time and day in at least two of the four weeks.
- e. A station qualifying for a "mini-series" must air at least two times per week.
- f. Foreign language syndicated programs are excluded.
- g. A station must have telecast the Devotional program on at least three different days

for Monday through Friday programs.

There are certain programs in the Devotional category which, while they may be quite popular and generate significant audience ratings, do not appear in the RODPs because they do not meet the reporting criteria. Examples might be Christmas and Easter specials, Spanish-language programming, or monthly specials. Consequently, any determination of the relative fair value of the distant signal programming related to the Distribution Phase Devotional parties may be subject to adjustment to reflect the audiences attributable to these programs, if some evidence of the audiences of these programs can be identified.

VI. Relative Valuation Methodology

In order to develop relative fair market values for Devotional programming, the SDC retained Erkan Erdem, Ph.D. of KPMG to assess the Nielsen rating data and the CDC distant viewing data. The report of Dr. Erdem, attached to the SDC direct case, provides the details of his methodological analysis. I fully endorse his approach, which relies on a sophisticated assessment of local viewing and distant subscribership as principal tools for allocating shares. To the extent the methodology relies upon ratings derived from Nielsen's RODPs, adjustments should be made when more complete information about claimed, qualified programming is available. Further, as Dr. Erdem explains, special handling of WGNA Devotional programming is required due to the limited amount of compensable, retransmitted Devotional content as a percentage of all available religious programming on WGNA.

VII. Conclusions

Based upon actual practices in the broadcasting and pay television industries, it is clear that any methodology must reflect the popularity of the two groups of Devotional programming. Based on my experience as an appraiser for the communications and media

industries, it is my opinion that the Nielsen and distant subscriber data are the key tools to measure each compensable program's popularity and, hence, its value for purposes of these proceedings. This methodological approach comports with the procedures that are actually employed by broadcasters and multi-channel video program distributors ("MVPDs") to make programming decisions.

Media executives typically employ audience measurement data predictively. As discussed in my earlier testimony before the Judges, a program that performs well in consecutive ratings periods is highly likely to perform well in the future. Similarly, from the perspective of an MVPD, an executive necessarily does not have knowledge regarding how a distant signal or a specific imported program will perform within its franchise area before making a decision to import that signal. Data from other markets is used predictively. Similarly, in the absence of detailed distant signal viewing data, local viewing data from other markets is used predictively.

Extensive audience measurement data compiled and subjected to rigorous statistical standards by Nielsen is available and is routinely used as a predictor of a program's performance in a distant market. The data included in the RODP reports manifests two key indicators of value: 1) The decisions of professional programmers to distribute the programming, and 2) The choices of viewers to actually watch the programming.

Appendix C contains the full history of average household viewing for all Devotional programs in the RODP reports between February of 2010 and July of 2013, when Nielsen discontinued the publication. This data reveals informative general information about the Devotional sector.

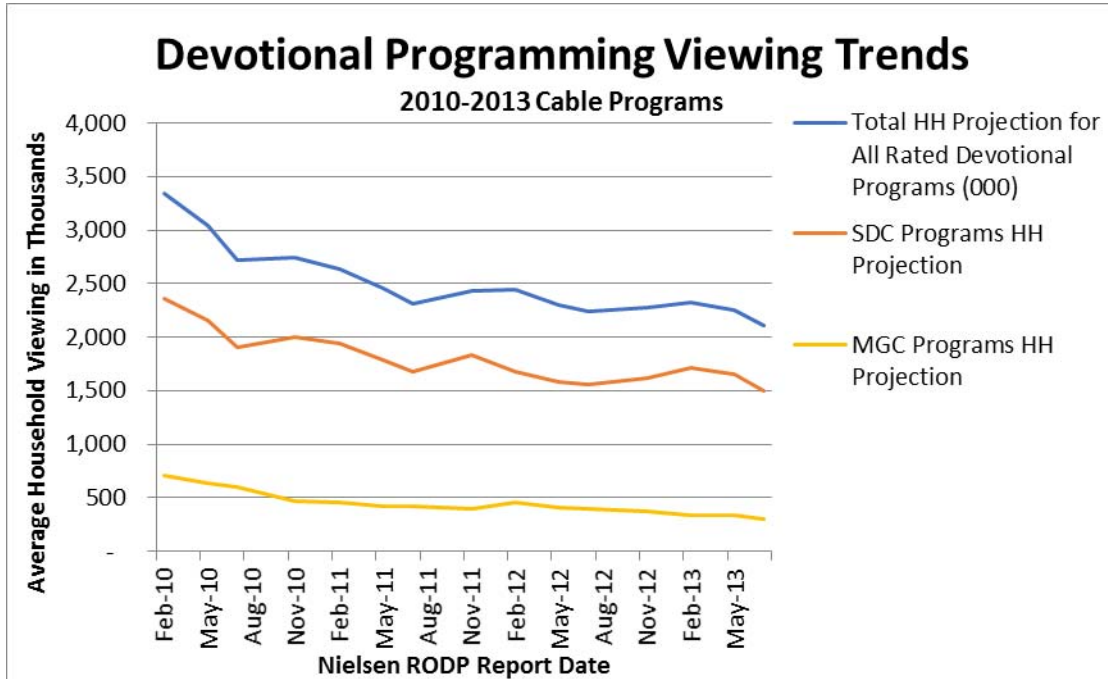
Overall, as shown in Appendix C, viewing of these programs on broadcast television

stations (predominantly on MVPDs and also over the air) eroded from approximately 3.3 million households to 2.1 million. This is consistent with the general erosion of viewing to broadcast television stations, and the additional development of some Devotional programs on cable networks.

It is noteworthy that viewing of Devotional programming is highly concentrated. Three programs (*Joel Osteen*, *In Touch*, and *The 700 Club*), are consistently ranked 1, 2, and 3. They alone account for more than half of all measured Devotional viewing. Remarkably, the share for these three programs alone grew from approximately 53% in 2010 to almost 70% of all measured Devotional viewing by 2013. All of these programs are associated with the SDC.

Over the entire time period, viewing of programming represented by the SDC was relatively steady at approximately 69% to 75% of all measured Devotional Viewing. In contrast, viewing of programs represented by MGC fell from 21% to 14%. The balance went to unrepresented programs. This data is shown graphically in Figure 1.

Figure 1



Comparing only claimed programs, the nationwide viewing of SDC programming increased from approximately 77% to 83%, while the MGC proportion fell from 23% to 17%.

Similarly, not all of the programs exhibited longevity. Of the 34 rated programs listed in Appendix C, only 20 appeared in every available RODP report. Of these, seven are associated with the SDC and five are associated with the MGC. Although the total number of measured programs declined from 32 to 25 over the period, it is important to note that much of the attrition relates to unstable and less highly viewed group of programs. There is often a story behind the numbers. For example, the disappearance of *Hour of Power* in 2010 and the decline of *Dr. D. James Kennedy*, are consistent with the declining health of Rev. Robert Schuller, the founder of the *Hour of Power*, and the challenging transition following the death of Dr. Kennedy in 2009. Conversely, the very steady performance of *Joel Osteen* reflects Mr. Osteen's innovative approach to televangelism, which has made his Lakewood Church the

largest “Megachurch” in the United States and his program the most highly viewed Devotional program in history.

Consistent with the theme that much of the “churn” in Devotional programming is related to less popular programs, an examination of the RODP reports also suggests that consumers of Devotional programming gravitate to more of the programming they prefer, rather than shifting to different programming. For example, the reports reveal that popular programs like *Joel Osteen* and *In Touch* are often broadcast on several channels, or at multiple times on the same channel.

The information in the RODP reports highlights the importance of audience measurements in the determination of the value and the relative value of television programming. The highest rated programs are generally the most enduring. As with larger and more enduring audiences, these programs share the most relative value for a myriad of purposes, including for the specific purpose of attracting customers to a cable or satellite system. This relationship is particularly important in the case of homogeneous programming that attracts a similar audience, like Devotional programming.

In short, the Devotional category has exhibited audience erosion patterns that are consistent with the television industry as a whole and the development of cable-only Devotional channels. Within the Devotional category, however, absolute viewing to the SDC claimants have been highly dominant, not just relative to these proceedings, but in the entire universe of Devotional programming. While certain MGC-claimed programs, such as *Jack Van Impe*, also exhibited relatively stable viewing, the measured viewing was much less significant.

In summary, the methodology in Dr. Erdem’s report, by considering data such as the

RODP reports, is consistent with industry best practices and represents a sensible, logical, and fair methodology for establishing the relative fair market values of the programs represented by MGC and the SDC. As Dr. Erdem observes, the SDC programs delivered higher Nielsen ratings (the most important measure of audience delivery and popularity in the television industry) consistently throughout the 2010-2013 period.⁵ To ignore this qualitative difference would undermine the very concept of value, and risk assigning the same value to filler and unpopular programming as to the programs that attract the largest and most loyal audiences. As a consequence, the following royalty allocation base represents a fair and reasonable basis for the allocation of royalties between the SDC and MGC claimants⁶:

Year	SDC Cable Share	SDC Satellite Share
2010	77.1%	75.3%
2011	82.6%	88.3%
2012	84.8%	90.7%
2013	89.1%	97.7%

In order to ascertain if the quantity and utility of the data employed in this analysis could be enhanced, Dr. Erdem and I participated in a series of teleconferences with executives from Nielsen. Based upon these discussions, we concluded that additional audience data regarding Devotional programming exists which did not appear in the RODP reports. As a result of these discussions, we recommended that the SDC acquire this additional data as it could potentially enhance the robustness and granularity of the relative fair market value calculation.

In December of 2017, the SDC acquired the additional audience data from Nielsen

⁵ Testimony of Erkan Erdem, Ph. D., December 22, 2017.

⁶ Ibid., Exhibit 5. It is noted that the different shares for cable and satellite purposes are attributed to the fact that there are different signals distantly retransmitted in the satellite proceeding than in the cable proceeding, and the subscriber counts for these signals are also different.

which includes additional measurements not included in the original RODP reports.⁷ This data included, for example, Devotional programs whose genre were categorized by stations as “Unclassified” (rather than Devotional) and which did not meet the specific reporting requirements described in Section V above. As quantified in the testimony of Dr. Erdem, although the additional data is small relative to the wealth of data contained in the RODP reports, the SDC receives an even higher share of viewing in this additional data than it did in the original RODP reports.⁸ As such, the additional data confirms the relationships in the RODP reports, and supports the conclusion that the RODP data should be a “floor” on the relative value of the SDC programs because, if one were to incorporate the additional information from the custom additional Nielsen data, it would only serve to boost the SDC-represented programming’s relative fair market value.

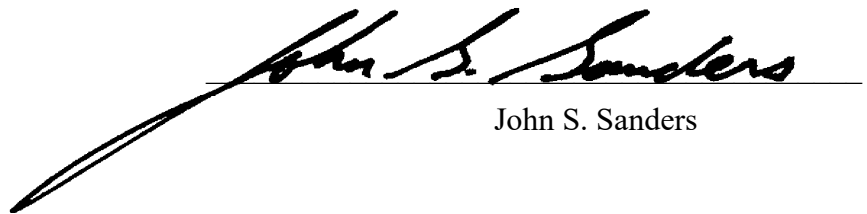
⁷ Dr. Erdem refers to this data in his Testimony as the “Supplemental Nielsen Data.”

⁸ Testimony of Erkan Erdem, Ph.D. at 27-28.

DECLARATION OF JOHN S. SANDERS

I declare under penalty of perjury that the foregoing testimony is true and correct and of my personal knowledge.

Executed: December 22, 2017

A handwritten signature in black ink, reading "John S. Sanders", is written over a horizontal line. The signature is cursive and stylized, with a long, sweeping underline that extends to the left.

John S. Sanders

Appendix A

Qualifications of John S. Sanders

PROFESSIONAL EXPERIENCE AND QUALIFICATIONS

JOHN S. SANDERS

John S. Sanders has over 30 years of experience in media and communications finance. He is a principal in and founder of the firm of Bond & Pecaro, Inc., a Washington based consulting firm specializing in valuations, asset appraisals, and related financial services for the communications industry since 1986.

Mr. Sanders has been actively involved in both fair market valuations and asset appraisals of over 3,000 communications and media businesses. He has been qualified as an expert in valuation matters regarding communications assets in venues including U.S. District Court for the District of Columbia, U.S. Bankruptcy Court for the Southern District of New York, the Court of Chancery of the State of Delaware, the American Arbitration Association and the Copyright Royalty Board.

He is a member of the American Society of Appraisers and is an Accredited Senior Appraiser (“ASA”) in the specialty of business valuation. He is also a member of the Media Financial Management Association and serves on its Board of Directors.

Mr. Sanders received a B.A. Cum Laude in Economics and International Studies (Honors) from Dickinson College. He also holds a Master of Business Administration degree from the University of Virginia in Charlottesville, Virginia.

John S. Sanders
Speaking Engagements, Publications, and Expert Testimony
Speaking Engagements

1. Cellular Telecommunications Industry Association, "Finding the Money Tree: Sources of Cellular Financing," First Annual Convention, Washington, D.C., May 29, 1985. Speech on effective business plan preparation and financing an acquisition.
2. National Association of Broadcasters, Radio Acquisition Seminar, Chicago, Illinois, October 25, 1985. Full day panel participation focusing on market evaluation, business valuation, and acquisition strategy.
3. National Association of Broadcasters, Radio Station Acquisition Seminar, New York, New York, November 1, 1985. Full day panel participation focusing on market evaluation, business valuation, and acquisition strategy.
4. National Association of Broadcasters, Small Market Radio Acquisition Seminar, Atlanta, Georgia, February 28, 1986. Full day panel participation focusing on market evaluation, business valuation, and acquisition strategy.
5. Cellular Telecommunications Industry Association, "An Acquisitive Industry: Mergers and Acquisitions in the Cellular Industry," Winter Meeting and Exposition, Phoenix, Arizona, January 21, 1987. Panel discussion on business valuation techniques and specific value trends in telecommunications.
6. FCC Week and BOC Week Washington Seminar, "Techniques for Valuing Cellular Franchises in Rural Service Areas," Presentation at conference entitled Business Opportunities in Rural Telecommunications: The Next Frontier, Washington, D.C., May 29, 1987.
7. Harrison, Bond & Pecaro Private Briefing on Media Financial Issues, Presentation on television network affiliation agreement valuation, Watergate Hotel, Washington D.C., December 14, 1987.
8. Cellular Telecommunications Industry Association, "Strong Signals From Wall Street," 1988 Winter Meeting and Exposition, San Diego, California, January 25, 1988. Speaker on panel on how the financial community views cellular.

John S. Sanders
Speaking Engagements, Continued

9. FCC Week and BOC Week Washington Seminar, "Market Analysis in Rural Service Area Cellular Telecommunications Systems," Presentation at conference on rural telecommunications issues, Washington, D.C., March 22, 1988.
10. Broadcast Financial Management Association, "The Impact of Proposed Tax Code Changes on Broadcast and Cable Values," 28th Annual Conference, New Orleans, Louisiana, April 18, 1988.
11. Phillips Publishing, Inc. Washington Seminar, "Valuation of Mobile Telecommunications Companies," Conference on buying, selling, and investing in mobile telecommunications, Washington, D.C., June 9, 1988.
12. Cable Television Property and Sales Tax Group, "Methods of Valuation in Property Taxes," Chicago, Illinois, September 27, 1988.
13. Telocator Spring Convention, Moderator, Panel entitled "Optimizing an Acquisition: Tax & Depreciation Issues," Orlando, Florida, May 1989.
14. Telocator 41st Annual Convention & Exposition, "Tax and Financial Reporting Issues in Acquisitions," Washington, D.C., October 7, 1989.
15. Telocator Spring International Convention, Moderator, Panel entitled, "The Financial Future of Cellular Telecommunications," San Diego, California, March 23, 1991.
16. Mobile Communications North America Exposition, Moderator and Speaker, Panel entitled "Site Acquisition and Management," Toronto, Canada, April 25, 1991.
17. Mobile Communications Marketplace, Moderator and Speaker, Panel entitled "Investment Outlook for Mobile Communications," Anaheim, California, October 23, 1991.
18. The Future of Paging, Moderator and Speaker, Panel entitled "Financing for Paging Growth," Washington, D.C., April 3, 1992.

John S. Sanders
Speaking Engagements, Continued

19. Mobile Communications Marketplace, Moderator and Speaker, Panel entitled "Tax Issues in the 1990s," San Francisco, California, September 24, 1992.
20. The Future of Paging II, Moderator and Speaker, Panel entitled "Dollars and Sense: The Financial Future of Paging," Washington, D.C., June 25, 1993.
21. National Association of Broadcasters, Speaker, Panel entitled "Broadcasters and Taxation: New Benefits...and New Liabilities?" Las Vegas, Nevada, March 22, 1994.
22. Personal Communications Industry Association PCS Summit, Speaker, Panel entitled "Service Requirements for PCS: A Financial Perspective," Arlington, Virginia, June 24, 1994
23. Mobile Communications Marketplace, Speaker, Panel entitled, "Facts and Figures: Forecasting the Future of PCS," Seattle, Washington, September 22, 1994.
24. National Association of Broadcasters, Speaker, Panel Entitled "Buying and Selling Broadcast Stations in a Changing Regulatory Environment", Las Vegas, Nevada, April 12, 1995.
25. National Association of Broadcasters, Panel Entitled "Tax Reform School - The Impact of Proposed Tax Reforms of Broadcasting Station Values", Las Vegas, Nevada, April 6, 1998.
26. National Association of Broadcasters, Broadcasting Conference for the Americas, Panel Entitled "Station Valuation Techniques and Trends", Miami, Florida, August 26, 1999.
27. National Association of Broadcasters, 1999 Radio Show, Panel Entitled "Investing in Latin America", Orlando, Florida, September 1, 1999.
28. National Association of Broadcasters, Broadcasting Conference for the Americas, Panel Entitled "Buying and Selling a Station in Broadcasting", Miami, Florida, August 16, 2000.

John S. Sanders
Speaking Engagements, Continued

29. National Association of Broadcasters, Broadcasting Conference for the Americas, Moderator of Panel Entitled “Investing Partners - Looking Beyond Boundaries”, Miami, Florida, July 25, 2001.
30. Web Hosting Expo, Moderator of Panel Entitled “Venture Capital Looks at Web Hosting”, Washington, DC, August 21, 2001.
31. National Association of Broadcasters, Presentation Entitled “Broadcasting Valuation in an International Environment”, Las Vegas, Nevada, April 7, 2002.
32. United States Telecom Association, Presentation Entitled “Telecommunications Valuation in an International Environment,” Briefing to Egypt Telecom Delegation, September 23, 2002.
33. Broadcast and Cable Financial Management Association, Presentation Entitled “What’s It Worth? Media and Communications Valuation Techniques and Trends in Mid-2004,” Atlanta, Georgia, May 16, 2004.
32. National Association of Broadcasters, Ownership Forum, Las Vegas, Nevada, April 15, 2007.
33. National Association of Broadcasters, Ownership Forum, Las Vegas, Nevada, April 13, 2008.
34. Minority Media & Telecom Council, Financial and Procurement Forum, Washington, DC, July 21, 2009.
35. Media Financial Management Association, Moderator and Presenter on Newspaper Valuation Panel, Presentation on Public and Private Values of Newspaper Companies, Nashville, Tennessee, May 24, 2010.
36. Media Financial Management Association, Moderator and Presenter on Newspaper Valuation Panel, Presentation on Public and Private Values of Newspaper Companies, Atlanta, Georgia, May 16, 2011.

John S. Sanders
Speaking Engagements, Continued

37. Media Financial Management Association, Moderator and Presenter on Newspaper-Broadcast Cross-Ownership, Presentation on Attrition of FCC-Permitted Newspaper-Television Cross-Ownership entities, Las Vegas, Nevada, May 22, 2012.
38. Media Financial Management Association, Moderator and Presenter on Newspaper Mergers, Acquisitions and Valuation Panel, Presentation on Valuation Trends and Merger Activity, Las Vegas, Nevada, May 23, 2012.
39. Media Financial Management Association, Presenter on FCC's Broadcast Incentive Auction Panel, Presentation of Spectrum Economics and Auction Strategies, New Orleans, Louisiana, May 20, 2013.
40. Media Financial Management Association, Moderator and Presenter on Newspaper Mergers, Acquisitions and Valuation Panel, Presentation on Valuation Trends and Merger Activity, New Orleans, Louisiana, May 21, 2013.
41. Media Financial Management Association, Moderator and Presenter on Newspaper Mergers, Acquisitions and Valuation Panel, Presentation on Valuation Trends and Merger Activity, Miami, Florida, May 20, 2014.
42. Media Financial Management Association, Presenter on Economic and Functional Obsolescence in the Appraisal of Personal Property, Miami, Florida, May 20, 2014.
43. Media Financial Management Association, Moderator and Presenter on Newspaper Mergers, Acquisitions and Valuation Panel, Presentation on Valuation Trends and Merger Activity, Phoenix, Arizona, May 19, 2015.
44. Media Financial Management Association, Moderator and Presenter on Newspaper Mergers, Acquisitions and Valuation Panel, Presentation on Valuation Trends and Merger Activity, Denver, Colorado, May 23, 2016.

John S. Sanders
Speaking Engagements, Continued

45. Media Financial Management Association, Moderator, Panel on Alliance for Audited Media measurement of print and digital audiences, Denver, Colorado, May 24, 2016.
46. Media Financial Management Association, Moderator, Panel on Alliance for Audited Media measurement of print and digital audiences, Orlando, Florida, May 22, 2017.
47. Media Financial Management Association, Moderator and Presenter on Newspaper Mergers, Acquisitions and Valuation Panel, Presentation on Valuation Trends and Merger Activity, Orlando, Florida, May 23, 2017.
48. Enterprise Wireless Alliance, Wireless Leadership Summit, Speaker, Presentation entitled “What’s it Worth? Valuing Your Business,” Denver, Colorado, October 12, 2017.
49. American Society of Appraisers, Washington, DC Chapter Meeting, Speaker, Presentation entitled, “The Great Spectrum Auction of 2017,” Bethesda, Maryland, November 14, 2017.

John S. Sanders
Publications

1. "Cellular Financing for Smaller Players," Telocator, February, 1986.
2. "Valuing Cellular Systems: Techniques and Trends," Telocator, December, 1986.
3. "The Amortization of Intangible Assets: Overview and Current Issues," Handout at Tax Panel, Broadcast Financial Management Association, Boston, Massachusetts, April 27, 1987.
4. "Making the Most of an Acquisition," Telocator, May 1987 Telocator Convention Issue.
5. "A Tale of Two RSAs: Entrepreneurial Opportunities in RSA Cellular Markets," Cellular Business, December 1987.
6. "What's a TV Network Affiliation Worth?" Broadcasting, December 21, 1987.
7. "Cellular's Future and the Laws of Economic Power," Communications, April 1988 International Mobile Communications Expo Issue.
8. "Broadcast Fixed Asset Tax Lives Under Reconsideration," Broadcast Financial Journal, April-May 1988.
9. "Subscriber Management: The Key to Maximizing SMR System Value," SMR Newsletter, June 1990.
10. "Site Lease Management: Steps to Economic Advantage," SMR Newsletter, October 1990.
11. "Legislative and Tax Update," Open Channels, November 1991.
12. "Update on Amortization of Intangible Assets," Broadcast/Cable Financial Journal, February-March 1992.
13. "Changes in Broadcast Station Values Resulting From the 1993 Omnibus Budget Reconciliation Act," Co-authored chapter with Timothy S. Pecaro in 1993 TAX ACT - What It Means, National Association of Broadcasters, 1994.

John S. Sanders
Publications, Continued

14. “Inversión en televisión en el ámbito interamericano,” TV y Video LatinoAmerica, April 2000.
15. Co-Editor, The Television Industry: Market-By-Market Review, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015 and 2016 Editions. 450 page reference volume containing detailed market data and projections for over 200 television markets.
16. With Harmeet K. Dhillon, “The New Gold Rush? Wireless opportunities for colleges and universities through EBS broadcast spectrum leases”, University Business, October 2007.
17. “Financial and Accounting Considerations for Acquisitions,” Chapter in Understanding Broadcast and Cable Finance, Chicago: Broadcast and Cable Financial Management Association, 2008.
18. “How Stations Can Reclaim Their Value,” TVNewsCheck, www.tvnewscheck.com, July 15, 2009.
19. “Kill TV-Newspaper Crossownership Rule, Now,” TVNewsCheck, www.tvnewscheck.com, June 27, 2012.
20. “The Good, The Bad, and the Opportunity: The tables are turning as investors purchase newspaper properties and reposition their operations for profitability,” The Financial Manager, September/October 2012.
21. “Newspapers Round a Bend,” The Financial Manager, November/December, 2013.
22. “Current Valuation Issues: Opportunities and Pitfalls on the Road to the Television Spectrum Auction,” Bond & Pecaro, Inc., White Paper, December 2013.
23. “Compressed Press Values: Some newspaper managers fail to realize that they are valuing their printing assets inaccurately,” The Financial Manager, July/August 2014.
24. “An Auction Like No Other: The World’s Largest and Most Complex Auction is About to Take Place, and there are Billions of Dollars to be Gained, or Expended,” The Financial Manager. November/December 2015.

John S. Sanders
Publications, Continued

25. “TV’s Tech Revolution - The television business will never be the same with the advent of two major changes: the spectrum repack and the new ATSC 3.0 Standard,” The Financial Manager, September/October, 2016. With Andrew D. Bolton
26. “A Post-Auction Rainbow: While TV broadcasters’ spectrum auction results were underwhelming, new market conditions may provide favorable opportunities,” The Financial Manager, May/June 2017.
27. “TV’s Optical Illusion,” The Financial Manager, January/February 2018.

John S. Sanders
Expert Testimony

1. Radio Telephone Systems, Inc. v. Metronet, Inc., American Arbitration Association, AAA #11 119 00070 91. Testimony regarding changes in the financial condition of a radio paging business.
2. All City Communications Co. v. Industrial and Commercial Communications Services, Inc., Milwaukee County, Wisconsin Circuit Court, 91-CV-003745. Testimony regarding the value of radio paging systems.
3. Capobianchi v. Foster, U.S. District Court, District of Columbia, 89-0936 NHJ-PJA. Testimony regarding the fair market value of a cellular telephone system and related economic issues.
4. O. R. Estman, Inc. d/b/a Satellite Paging v. Tel-Air Communications, Inc., et. al., U.S. District Court, District of New Jersey, 91-5273(HCL). Testimony regarding the economics of the radio paging industry.
5. Cellular Information Systems, Inc., C.I.S. Operating Company-1, Inc., et. al., Debtors, U. S. Bankruptcy Court, Southern District of New York, Case Nos. 92 B 45024 through 92 B 45037 (BRL) (Jointly Administered). Testimony regarding the value of cellular telephone systems in five metropolitan markets and three rural service areas, and related economic issues.
6. Application of Vertical Broadcasting, Inc., Town Board, Southampton, New York, May 31, 1996. Testimony regarding the future of the communications industry and other issues related to the construction of a 360' multi-user communications tower.
7. CenCel, Inc., MCT Cellular, Inc. and SCC Cellular Telephone Corporation v. Contel Cellular, Inc., SS Superior Court, Hillsborough County, State of New Hampshire, Northern District Case No. 96-E-126. Testimony regarding the value of a cellular telephone system and related economic issues.

John S. Sanders
Expert Testimony, Continued

8. In re: Personal Communications Services World Corporation, Debtor., United States Bankruptcy Court for the District of Nevada, Bankruptcy No. 99 BK-N-31344. Testimony regarding the value of a specialized competitive local exchange carrier and related economic issues.
9. Interstate Cellular Holdings, Inc. vs. Radiofone, Inc., American Arbitration Association, Philadelphia, Pennsylvania, Case No. 14 Y 181 00138 00 F. Testimony regarding the value of a cellular telephone system and related economic issues.
10. In re: United States Cellular Operating Company, Court of Chancery of the State of Delaware in and for New Castle County, Civil Action No. 18976 NC. Testimony regarding the value of two cellular telephone systems.
11. Paul L. Kozel, et al v. Kent S. Foster and Concho Cellular Telephone Company, Inc., American Arbitration Association, AAA #16 168 00391 02 and #70 168 00390 02. Testimony regarding the value of a cellular telephone system and related economic issues.
12. WideOpenWest, LLC. Board of Assessment Appeals. Jefferson County, Colorado. Schedule# 976855. Docket# 40405. Testimony regarding the state of the broadband industry and the value of cable television, Internet, and telephony assets.
13. Broadcast Music, Inc. vs. Weigel Broadcasting Co., United States District Court, Southern District of New York, No. 04 Civ. 09205 (LLS). Testimony regarding economic factors in the television industry and calculation of music rights fees.
14. The Denver Post, LLC v. Adams County Board of Equalization, Docket Nos. 62566 and 62567 (Consolidated), Tax Year 2013. Testimony regarding the value of printing, distribution, and robotic delivery systems and physical, technological, and economic obsolescence.
15. In the Matter of Phase II Distribution of 1998 and 1999 Cable Royalty Funds, Docket No. 2008-1 CRB CD 98-99 (Phase II). Before the Copyright Royalty Judges, Library of Congress, Washington, DC. Testimony regarding the valuation of media assets.

John S. Sanders
Expert Testimony, Continued

16. In the Matter of Phase II Distribution of 2004-2009 Cable Royalty Funds and In the Matter of Phase II Distribution of 1999-2009 Satellite Royalty Funds, Dockets No. 2012-6 CRB CD 2004 - 2009 (Phase II) and No. 2012-7 CRB CD 2000-2009; 2008-5 SD 1999-2000 (Phase II). Before the Copyright Royalty Judges, Library of Congress, Washington, DC. Testimony regarding the valuation of media assets.
17. In the Matter of Distribution of 2010-2013 Cable Royalty Funds (Consolidated Proceeding) Docket No. 14 CRB-0010 CD (2010-2013) (Allocation Phase). Before the Copyright Royalty Judges, Library of Congress, Washington, DC. Written testimony regarding the valuation of media assets.
18. In the Matter of Phase II Distribution of 2000-2003 Cable Royalty Funds Docket No. 2008-02 CD 2000-03 (Remand). Before the Copyright Royalty Judges, Library of Congress, Washington, DC. Written testimony regarding the valuation of media assets.

Appendix B

Listing of Program Titles Claimed By Settling Devotional Claimants

Cable Claimant	Program Titles	2010	2011	2012	2013
Amazing Facts Inc.	Amazing Facts	x	x	x	x
	Amazing Facts Presents				
	New Revelation				
	Central Study Hour				
American Religious Town Hall Meeting, Inc.	Religious Town Hall	x	x	x	x
	American Religious Town Hall Meeting				
	Town Hall				
Billy Graham Evangelistic Association	Billy Graham	x	x	x	x
	60th Anniversary				
	60th Anniversary of BGEA				
	A Vow to Cherish				
	A Year of Good News				
	ALWAYS GOOD NEWS				
	Billy Graham - Always Good News				
	BILLY GRAHAM CHRISTMAS SPECIAL				
	BILLY GRAHAM CRUSADE				
	Billy Graham Special				
	Billy Graham Television Special				
	Caught				
	Choose Christ				
	Choosing Christ				
	CLIMB (THE)				
	Cross, The				
	CRY FROM THE MOUNTAIN				
	Defining Moments				
	Festivals Milwaukee and Denver				
	Festivals: India, Lithuania				
	Foolishness of the Gospel				
	FOR PETE'S SAKE				
	Franklin Graham				
	Franklin Graham Festivals				
	Franklin Graham Festivals International				
	2010				
	Greatest Journey, The				
	Haiti Stories				
	Hiding Place				
	HIDING PLACE, THE				
	HOMECOMING, THE				
	International Festivals				
	JONI				

Last Flight Out
 Lose to Gain
 My Hope with Billy Graham
 MY HOPE AMERICA WITH BILLY
 GRAHAM: THE CROSS
 My Hope Malawi
 My Hope Thailand
 MY HOPE WITH BILLY GRAHAM:
 DEFINING MOMENTS
 POWER PLAY
 PRODIGAL, THE
 Rapid Response Team - Haiti
 Repeat Performance
 Response Around the Globe
 Restless Ones, The
 Results
 Results: International, My Hope, Rock
 the Lakes Follow Up
 Results: Intl, MH, RTL FU
 RIDE, THE
 Rock the River Tour West Canada
 RRT - Haiti
 RTRT West Canada
 Scars That Heal
 Search for Jesus
 Sowing Seeds of Hope
 SOWING THE SEEDS OF THE
 GOSPEL
 TGJ-FG Roundtable
 The Climb
 The Greatest Journey
 The Greatest Journey-Franklin Graham
 Roundtable
 The Hiding Place
 The Home Coming
 The Homecoming
 The Prodigal Son
 The Restless Ones
 VOW TO CHERISH, A
 Year in Review - Christmas

Catholic Communications Corporation

Chalice of Salvation
 Reel to Reel

x x

**Coral Ridge Ministries
Media, Inc.**

	X	X	X	X
Coral Ridge Hour				
Dr. James Kennedy				
Scrooge and Marley				
Who is Jesus				
What if Jesus Had Never Been Born				
Cross Examine				
Kennedy Classics				
Truth that Transforms				
Truth In Action				
Can America Survive?				
Socialism: A Clear and Present Danger				
Freedom on Trial				
Attack on Freedom: ADF Religious Liberty				

**Cottonwood Christian
Center**

	X	X		
Answers with Bayless Conley				
Cottonwood Church				
Bayless Conley				
Cottonwood Christian Center				

**Crenshaw Christian Center aka Ever Increasing Faith
Ministries**

	X	X	X	X
Dr. Frederick Price				
Ever Increasing Faith				
Crenshaw				
Fred Price				

**Crystal Cathedral
Ministries, Inc.**

	X	X	X	X
Hour of Power				
Christmas Eve at the Crystal Cathedral				
Robert Schuller or Rev. Schuller				

**Family Worship Center
Church Inc.**

	X	X		
Jimmy Swaggart				
Jimmy Swaggart Weekly				

It is Written, Inc.

	X	X	X	X
It Is Written				

**John Hagee Ministries
Inc.**

	X	X	X	X
John Hagee				
John Hagee Today				
Cornerstone				
The Difference				
Hagee Hotline				

Joyce Meyer Ministries Inc.	Matthew Hagee				
		X	X	X	X
	Joyce Meyer				
	Enjoying Everyday Life				
	Life in the Word				
Lakewood Church aka Joel Osteen Ministries	Life in the World				
	Everyday Answers				
		X	X	X	X
	Joel Osteen				
	Lakewood Church				
In Touch Ministries, Inc.	Marcus Witt/ Marcos Witt				
		X	X	X	X
	In Touch				
	In Touch 30				
	In Touch 60				
RBC Ministries	In Touch with Charles Stanley aka In Touch with Dr. Charles Stanley				
	Dr. Charles Stanley				
	En Contacto				
		X	X		
	Day of Discovery				
Oral Roberts Evangelistic Association, Inc.		X	X		
	Oral Roberts				
	Miracles Now				
	Make Your Day Count				
	Chronicles of Faith				
Rhema Bible Church dba Kenneth Hagin Ministries	Place for Miracles (a/k/a Richard Roberts)				
	Hour of Healing (a/k/a Richard Roberts)				
	Something Good Tonight				
		X	X		
	Rhema Praise				
Ron Phillips Ministries (aka Abba's House Media)	Rhema Today				
	Kenneth Hagin				
		X	X		
	Abba's House				
	Central Baptist Church				
The Potter's House of Dallas, Inc. aka T.D. Jakes Ministries	Central Message				
	Ron Phillips				
	Ron Phillips from Abba's House				
		X	X		
	TD Jakes				
	Potters Touch				
	Potters House				

Zola Levitt Ministries		X	X		
	Zola Levitt				
	Zola Levitt Presents				
Kerry Shook Ministries aka Fellowship of The Woodlands Church, Inc.		X	X	X	X
	Kerry Shook				
	Kerry Shook Ministries				
New Psalmist Baptist Church		X	X		
	Empowering Disciples				
	New Psalmist Baptist Church				
St. Ann's Media		X	X		
	The Daily Mass				
	Holy Sacrifice of the Mass				
	The Mass				
	Mass on TV				
Messianic Vision, Inc.		X	X	X	X
	Sid Roth aka Sid Roth It's Supernatural				
	It's Supernatural				
	Project 77				
Living Word Christian Center		X	X	X	X
	Believer's Walk of Faith				
	Bill Winston				
Philadelphia Church of God, Inc.		X	X	X	X
	Key of David				
Word of God Fellowship, Inc. d/b/a Daystar Television Network		X	X	X	X
	Celebration				
	Celebracion en Daystar				
	Check the Sound				
	Joni Table Talk				
	Joni Lamb				
	Marcus and Joni				
	Reflections				
	Empowered by the Spirit (a/k/a Marcus Lamb)				
	Gospel Music Showcase				
Free Chapel Worship Center, Inc.		X	X		
	Free Chapel				
	Kingdom Connection				
	Jentezen Franklin				
The Christian Broadcasting Network, Inc.		X	X	X	X
	The 700 Club				
	700 Club Interactive				

Christian World News				
One Cubed				
Living the Life				
Miracles				
CBN Miracles				
Spunky's First Christmas				
Spunky's Camping Adventure				
Spunky's Circus Adventure				
Micah's Christmas Treasure				
Scott Ross Straight Talk				
Alabaster's Song				
Superbook				
Superlibro				
Vida Dura				
Flying House				
Respuestas				
Turning Point International				
Mundo Cristiano				
Aqua Viva				
Storyteller's Café				
Easter Promise				
Rescatados del Infierno				
The Witness				
Club 700 Hoy				
Answers				
Moving Mountains				
Salida Directa				
La Casa Voladora				
La Maison Volante				
The Brody File				
Stackelbeck on Terror				
The Watchman				
CBN Newswatch				
Living Church of God (International), Inc.		X		X
Tomorrow's World				
Can You Trust the Bible				
The Miracle of the Ten Commandments				
Living For Tomorrow				
Is God Fair?				
Jerusalem: City of Peace				
Five Ways to Enrich Your Marriage				
Christian Television Corporation		X	X	X
			X	X
All Over the World				
Becky's Barn				
Bloodstream				

	Bridges				
	Christian Fitness				
	Coffee Club				
	Times of Refreshing				
	Herman & Sharron				
	Homekeepers				
	Joy Junction				
	You and Me				
	America's Prayer Meeting				
Cornerstone Television, Inc.		X	X	X	X
	34th Anniversary Celebration				
	A Nichol's Worth				
	At Home Anniversary Celebration				
	Born to be Free				
	Celebrate One				
	Child, Change, Future				
	Christmas From the Heart				
	Close Up & Personal with Benny Hinn				
	Convoy of Hope				
	Craft Show				
	Curt Landry				
	Days of Harvest Telethon				
	Father's Day Special				
	Focus 4				
	Focus 4 Special Edition				
	Forward in Faith				
	Getting Together for Christmas				
	His Place				
	Hope in the Tragedy				
	LaVerne Tripp				
	Operation Holiday Hope				
	Origins				
	Prayer One				
	Real Life				
	Real Life Family Time 1 Hour Specials				
	Real Life Family Time Telethon				
	Resolution of Hope				
	Rescuers				
	Richard Roberts				
	Ron Hembree Memorial				
	Shout in the New Year				
	Telethon: Beyond the Call				
	wwwinterACTIVE				

Source: SDC Listing of Claimants and Program Titles as confirmed by emails.

Appendix C

Summary of *Report on Devotional Programs* Household Viewing

	2010				2011				2012				2013		
Program Name	Feb	May	Jul	Nov	Feb	May	Jul	Nov	Feb	May	Jul	Nov	Feb	May	Jul
THE 700 CLUB	337	292	247	261	276	243	228	246	260	208	213	216	236	219	221
AMAZING FACTS	10	35	17	24	21	30	19	24	30	21	23				
AMERICAN RELIGIOUS TOWN HALL	12	15	14	18	15	21	16	25	12	11	14	14	17	13	9
ANDREW WOMMACK MINISTRIES	43	35	36	23	23	27	27	27	29	23	27	23	29	29	35
BENNY HINN'S THIS IS DAY															
BENNY HINN'S THIS IS DAY - DAILY	6	7													
CORNERSTONE HOUR	141	125	111	132	122	114	94	122	104	94	76	60			
CREFLO A. DOLLAR, JR.	150	129	122	111	94	86	90	95	113	100	107	70	17	13	13
CREFLO A. DOLLAR, JR. - DAILY															
DAY OF DISCOVERY	74	66	62	83	73	78	77	95	99	102	88	70	93	62	78
DR. D. JAMES KENNEDY	110	100	95	112	70	41	45	10	13	8	8	12	13	9	9
ENJOYING EVERYDAY LIFE	80	74	37	43	33	36	28	25	28	28	20	25	23	23	24
ERNEST ANGLE	25	17	14	25	26	17	10	12	10	16	13	17	13	10	6
EVER INCREASING FAITH	17	16	13												
GARNER TED ARMSTRONG	3					4	6								

GOOD NEWS	8	11	12	6	5	11	9	9	6	7	9	9	7	9	9
HOOR OF POWER	84	39													
IN TOUCH 30	94									32		35	45	42	37
IN TOUCH 60	396	401	371	388	380	352	351	391	392	386	381	382	429	384	348
IT IS WRITTEN	46	41	29	40	36	36	30	29	28						
JACK VAN IMPE PRESENTS	228	225	228	243	262	245	241	226	255	227	212	248	255	257	214
JAMES ROBISON - LIFE TODAY	44	38	26	27	24	24	24	17	16	19	16	14	13	17	17
JESSE DUPLANTIS	61	40	33	62	52	38	28	27	27	26	19	28	27	21	19
JOEL OSTEEN	909	895	854	840	869	784	760	817	773	750	793	831	910	910	814
JOHN HAGEE TODAY	9	7	3	5	5	3	5	7	8	10	8				
KENNETH COPELAND	197	165	151	21	14	17	17	10	15	11	8	7	8	6	6
KENNETH COPELAND - DAILY	77	73	68	66	56	53	51	49	56	49	48	37	41	40	47
KEY OF DAVID	38	51	49	54	44	44	24	36	34	35	26	44	41	49	31
MASS FOR SHUT-INS	17	10	8	7	12	11	9	10	12	14	11	10	10	8	17
MICHAEL YOUSSEF															26
MUSIC & THE SPOKEN WORD	48	47	42	39	34	45	43	44	42	45	32	49	34	40	42
PETER POPOFF											7	6	11	15	19
SEARCH - M. LYON	22	30	20	31	22	25	15	16	25	17	20	14	19	15	17
SHEPHERD'S CHAPEL	31	35	31	32	30	28	36	37	32	34	35	28	30	31	31
TIME OF GRACE	17	16	16	36	32	35	27	23	23	21	20	23	22	26	18
WISDOM KEYS/MIKE MURDOCK	9	8	7	10	8	10	4								
Grand Total	3343	3043	2716	2739	2638	2458	2314	2429	2442	2294	2234	2272	2343	2248	2107
Count	32	30	28	27	27	28	28	26	26	26	26	25	24	24	25

SDC Total	2357	2157	1902	2000	1944	1782	1677	1827	1682	1583	1562	1619	1744	1649	1493
SDC Percent of Total	71%	71%	70%	73%	74%	72%	72%	75%	69%	69%	70%	71%	74%	73%	71%
MGC Total	702	637	595	468	450	425	423	397	455	406	391	376	334	333	297
MGC Percent of Total	21%	21%	22%	17%	17%	17%	18%	16%	19%	18%	18%	17%	14%	15%	14%
SDC % of combined SDC and MGC	77%	77%	76%	81%	81%	81%	80%	82%	79%	80%	80%	81%	84%	83%	83%
MGC as % of Combined SDC and MCG	23%	23%	24%	19%	19%	19%	20%	18%	21%	20%	20%	19%	16%	17%	17%
Total/Check	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%
In Touch, Osteen and	1736	1588	1472	1489	1525	1379	1339	1454	1425	1376	1387	1464	1620	1555	1420
Percent of Total	52%	52%	54%	54%	58%	56%	58%	60%	58%	60%	62%	64%	69%	69%	67%

Source: The Nielsen Company, Report on Devotional Programming, February 2010 through July 2013. Settling Devotional Claimants claims in yellow. Multigroup Claimants claims in beige. Columns contain average weekly household audience.

**Before the
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The Library of Congress**

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)	
In the Matter of)	
)	DOCKET NO. 14-CRB-0010-CD
DISTRIBUTION OF 2010-2013)	(DISTRIBUTION PHASE)
CABLE ROYALTY FUNDS)	
)	DOCKET NO. 14-CRB-0011-SD
DISTRIBUTION OF 2010-2013)	(DISTRIBUTION PHASE)
SATELLITE ROYALTY FUNDS)	
<hr/>		

Testimony of Erkan Erdem, Ph.D.

December 22, 2017

TESTIMONY OF ERKAN ERDEM, PH.D.

December 22, 2017

I. Qualifications

1. I, Erkan Erdem, am a Managing Director at KPMG LLP (KPMG) in the Economic and Valuation Services (EVS) practice. The economists and statisticians of the EVS practice provide expert analyses on economic and statistical matters to a variety of clients.
2. I received a Bachelor of Science in Mathematics and Bachelor of Arts in Economics from Koç University in Istanbul, Turkey in 2000. I subsequently earned a Ph.D. in Economics from The Pennsylvania State University in 2006. Between 2006 and 2010, I worked as an antitrust economist for Bates White, LLC, an economic consulting firm where I prepared expert reports on mergers and acquisitions, monopolization disputes, market power and concentration issues, and cartels. From 2010 to 2013, I worked as an economist at IMPAQ International, a research and consulting firm. In that role, I led large projects for federal agencies such as the Centers for Medicare & Medicaid Services (CMS). Since joining KPMG in September of 2013, I have been involved in projects for the New York State Department of Health, the CMS, and Maryland Health Services Cost Review Commission (HSCRC) among other clients. For the last four years, I have been teaching graduate-level econometrics at University of Maryland as an Adjunct Professor in the Masters in Applied Economics program. My research has been published in peer-reviewed economic journals. I have presented my work and research findings at numerous conferences to a wide range of audiences. I have also testified in a prior proceeding before the Copyright Royalty Board.

3. My curriculum vitae with detailed information on my publications, project work, and conference presentations is attached as **Exhibit 1**. This report is based upon information made available to me. I worked with a team of economists and analysts at KPMG who worked under my guidance during the preparation of my report. I reserve the right to supplement this report should additional information be made available in the future.
4. The methodology I present in this report provides royalty shares that are consistent with the concept of relative market value in economics. The royalty shares that are based on this methodology are presented in **Exhibit 5**.

II. Royalty Allocation Process Overview

5. The purpose of this proceeding, known as the Distribution Phase (formerly called Phase II), is to determine the allocation of royalty funds between two categories of claimants represented by Settling Devotional Claimants (SDC) and Multigroup Claimants (MGC) in the Devotional category. The funds that are relevant for this proceeding were collected for 2010-2013 cable and satellite retransmissions. It is also my understanding that the Allocation Phase, which allocates funds between eight different categories of programming (e.g., Devotional, Sports, Program Suppliers, etc.), is ongoing and allocation of the funds across these categories has not been completed.¹
6. It is my understanding that per Section 111 and Section 119 of the Copyright Act these royalty payments are made by Cable System Operators (CSOs) and Satellite Operators (SOs), respectively (collectively, “Operators”), when they retransmit copyrighted works

¹ Distribution of the 1999-2009 Cable and Satellite Royalty Funds, Docket Nos. 2007-3 CRB CD 2004-2005, 2008-4 CRB CD 2006, 2009-6 CRB CD 2007, 2010-6 CRB CD 2008, 2011-7 CRB 2009; 2010-2 CRB SD 2004-2007, 2010-7 CRB 2008, 2011-8 CRB SD 2009, 76 Fed. Reg. 80969.

included in their broadcast television signals outside the program's original, local broadcast area.² Royalties are deposited semiannually based on the formulas set forth in the Copyright Act. The owners of the copyrighted works are required to file claims every July to receive a share of the royalties collected in the previous calendar year. Because royalty deposits are not directly tied to individual programs, the Judges of the Copyright Royalty Board are charged with the allocation of and distribution of royalties among the claimants. As I detail in the sections below, the guiding precedent is to measure the "relative market value" of programs to allocate shares of royalties among programs within the "zone of reasonableness."³

III. Materials Considered

7. I have obtained, reviewed, and used the following documents and data files during the preparation of this testimony:
- CRB Order of July 21, 2016 regarding discovery for the 2010-2013 cable and satellite proceeding.
 - Satellite Statements of Accounts for 1999-2013 from Cable Data Corporation.
 - Cable Statements of Accounts for 1999-2013 from Cable Data Corporation.
 - Programming data for WGN, both for the local market and the distant market (via satellite), for 1999-2013 from Tribune Media Services.
 - Nielsen distant viewing data (estimated hours of viewing) for 1999-2003.
 - Nielsen Reports on Devotional Programs (RODPs) for February sweeps of 1999-2003.

² Final Determination of Distributions Phase II, In re Distribution of Cable Royalty Funds 2000-2003.

³ *Ibid.*

- Nielsen RODPs page R-7 for May, July, November 1999; May, July 2000; November 2001; July 2002; and May 2003.
- Nielsen RODPs for February, May, July, November 2010-2012; February, May, July 2013.
- Supplemental Nielsen Data for 2010-2013.
- Rebuttal Testimony of Alan G. Whitt, In the Matter of Phase II Distribution of the 2000, 2001, 2002, and 2003 Cable Royalty Funds.
- Amended Testimony of William J. Brown, In the Matter of Phase II Distribution of the 2000, 2001, 2002, and 2003 Cable Royalty Funds.
- Written Direct Statement of MPAA-Represented Program Suppliers, In the Matter of Distribution of the 2000, 2001, 2002, and 2003 Cable Royalty Funds.
- Testimony of Jeffrey S. Gray, Amended March 9, 2017, In the Matter of Distribution of the 2010, 2011, 2012, and 2013 Cable Royalty Funds.
- Direct Testimony of Paul B. Lindstrom, In the Matter of Distribution of the 2000, 2001, 2002, 2003 Cable Royalty Funds.
- Distribution Order, In the Matter of Distribution of the 2000-2003 Cable Royalty Funds.
- Initial Determination of Distributions of 1999 Cable Royalty Funds (Phase II).
- Final Determination of Distributions Phase II, In re Distribution of Cable Royalty Funds 2000-2003.
- Final Distribution Order, In the Matter of Distribution of the 2004 and 2005 Cable Royalty Funds.
- Revised list of primary programs represented by SDC for 1999-2009.

- List of Independent Producer Group (IPG)-represented claimants in the 1999 and 2000-2003 Cable Distribution proceedings (Phase II).
- List of programs represented by SDC and MGC for 2010-2013.
- Memorandum Opinion and Order Following Preliminary Hearing on Validity of Claims, In the Distribution of the 2000, 2001, 2002, and 2003 Cable Royalty Funds.
- Direct Testimony of John Sanders, In the Matter of Distribution of 2010-2013 Cable and Satellite Royalty Funds, June 30, 2017.
- Direct Testimony of Toby Berlin, In the Matter of Phase II Distribution of 2004-2009 Cable and 1999-2009 Satellite Royalty Funds, May 9, 2014.
- Supplemental Testimony of Toby Berlin, In the Matter of Phase II Distribution of 2004-2009 Cable and 1999-2009 Satellite Royalty Funds, August 17, 2016.

IV. Devotional Category and Relevant Programs

8. The Devotional category is comprised of syndicated programs of a primarily religious theme, not limited to those produced by or for religious institutions.⁴ It is my understanding that the copyrighted works that are included in Distribution Phase of the proceeding are represented by SDC and MGC. As an economist, I have been asked to propose the most appropriate methodology for the allocation of royalties for SDC and MGC claimants as part of the Phase II proceedings with a “zone of reasonableness” as provided by prior orders of the Judges, and their predecessor panels, which have been subject to appellate court review. In this

⁴ Stipulation of the Parties on the Issues of Program Categorization and Scope of Claims, In the Matter of 1990-1992 Cable Royalty Distribution Proceeding.

testimony, I provide a detailed methodology to help the Judges allocate royalty funds for the Devotional category between SDC and MGC claimants.

9. I received detailed Microsoft Excel spreadsheets with lists of claimants and program titles claimed by both SDC and MGC that appear prominently in the source material (Nielsen ratings data) that my analysis has focused on.

10. The Nielsen sweep reports are available for 2010-2013. The reports rank devotional programs that qualify for inclusion in the report for each sweep period. The criteria for Reporting Standards for programs (program reportability) are set forth in each report, and provided as follows:

“A. Program Reportability:

1. Syndicated devotional programs must meet the following requirements in order to qualify for inclusion herein:

- Program must be taped or on film and available for telecast on a market by market basis.*
- Program must have been telecast in at least five NSI markets on reportable commercial TV stations and scheduled at the same time and day in at least two of the four weeks.*

2. Additional Considerations:

- Programs with both black and white [and] color versions were combined where the program titles were the same.*

- *Foreign language syndicated programs are not included herein.*⁵

11. Similarly, the reports include criteria for station reportability for each sweep period as:

“Reportable stations are those which qualifies for reporting in the corresponding VIP for the market. Reporting standards are shown in Section III of the VIP and in the Local Reference Supplement. In addition:

- 1. A station must have telecast the devotional program once during the four measurement weeks (at least three different days for Monday - Friday programs.) Program reportability (see A-1. above) must be met prior to station inclusion.*
- 2. A station qualifying for a “Mini-Series” must have telecast the syndicated program two or more times during any week of the measurement. The telecasts need not have been scheduled at the same air time.*
- 3. Non-commercial stations are excluded.”*

12. These reports are a very useful guide to understanding what the viewers of religious programming really “value” (see tables R-7 of above-referenced Nielsen Reports). It should be noted that the number of programs included in the ranking is not constant over time. Also, not all program titles claimed by SDC and MGC appear in the Nielsen Reports due to reportability requirements. This is relevant because any allocation based on the Nielsen rankings or ratings will be exclusive of the programs that were not included in the rankings. I discuss this issue further in later sections.

⁵ See, for example, the Nielsen Report on Devotional Programs for February 2010, pages A-B, as well as station reporting requirements on page G, and other qualifications and explanations set forth in pages A-L.

13. As the Nielsen RODP reportability requirements excluded certain programs, including SDC- and MGC-claimed programs, from RODPs, I (along with SDC's other expert, John Sanders and counsel for SDC) initiated conversations with Nielsen regarding the possibility of obtaining additional devotional program viewing data. In December, 2017, Nielsen provided a series of reports consisting of sweep month viewing of programming designated as "devotional" in terms of genre by television stations. In addition, upon learning that certain programs claimed by SDC and MGC were alternatively designated by local stations as "unclassified" or some other genre, and thus excluded from the "devotional" genre report," Nielsen was provided with a list of SDC and MGC titles for additional reporting. Collectively, the devotional genre and additional titles reports are referred to as "Supplemental Nielsen Data" in the rest of my report.

14. The Supplemental Nielsen Data are derived from the same databases as the RODPs, namely data from sweep months in all 210 Designated Market Area ("DMA") regions within the United States for 2010-2013.⁶ The Supplemental Nielsen Data includes a) program titles; b) station carrying (including sweep month, start and end time, and market); ratings, shares and impressions (household viewers); and market size.

⁶ A DMA is the market area used by Nielsen to conduct audience measurements and, as a consequence, the area used by television-related businesses to make decisions regarding programming and advertising. Every county in the United States is assigned to a DMA. According to Nielsen, a "DMA region is a group of counties that form an exclusive geographic area in which the home market television stations hold a dominance of total hours viewed. There are 210 DMA regions, covering the entire continental United States, Hawaii, and parts of Alaska." <http://www.nielsen.com/intl-campaigns/us/dma-maps.html>, accessed December 21, 2017.

V. The Value of a Program: Relative Market Value

15. It is clear that the current mechanism that determines how the Operators compensate copyrighted program owners does not represent a “free” market in which buyers and sellers exchange goods at mutually agreeable prices. If the Operators could negotiate these prices with the program owners, the price they pay would be based on the “value” the program generates for the Operators. This standard – fair market value of a given program – has been discussed extensively by the Judges, and is defined as follows: “The price at which the right to transmit a program carried on a distant broadcast signal would change hands between a willing buyer (a CSO) and a willing seller (a copyright owner), neither being under any compulsion to buy or sell.”⁷ It is my understanding that the Judges agree that “viewership can be a reasonable and directly measurable metric for calculating relative market value” and that, for Distribution Phase purposes, “viewership is the initial and predominant heuristic that a hypothetical CSO would consider.”⁸ However, it is also my understanding that Judges are “reluctant to rely *solely* on viewership data merely because the marginal bundling adjustments are not readily measurable” in a Distribution Phase proceeding.⁹
16. The Operators sell bundles of channels to their subscribers with the purpose of attracting a wide range of viewers. That is, subscribers cannot pick and choose the channels they are interested in. Instead, they can select from a small list of “bundles” (ranging from “basic” channels to “premium” channels) which come with channels and programs a subscriber is interested in together with those the subscriber has no interest in watching. For this reason,

⁷ Final Determination of Distributions Phase II, In re Distribution of Cable Royalty Funds 2000-2003, at 22-27.

⁸ Final Determination of Distributions Phase II, In re Distribution of Cable Royalty Funds 2000-2003, at 37.

⁹ *Ibid.*

the Operators carry a wide range of TV channels covering program types such as sports, movies, TV shows, religious programs, and many more. Finally, it is worth summarizing the basic relationships between parties that constitute this “market.” TV stations put together (and purchase) menus of programs and other content that would appeal to their audience. Based on the demographic makeup of a given TV station’s audience, third parties (e.g., companies, organizations) purchase commercial time from the TV stations to market their goods and services. Then, considering the appeal of the TV station, Operators utilize the copyright law’s compulsory licensing system to carry TV signals on their menu of TV stations for subscribers. Subscribers decide which Operator bundles to choose from given the prices and content available to them in their local market. Even though subscribers appear to interact only with the Operators, their decisions indirectly depend on actions taken by individual TV stations as well, and more particularly the choices of programs carried by the TV station and their placement (time slots) during the broadcast day. Subscribers’ decisions in return affect how Operators and TV stations act.

17. The way the Operators operate may offer a few “candidate” methodologies to determine the relative market value of a program in the same category of program offerings, e.g. devotional, sports and syndication series: (1) program volume measured as numbers of programs or hours of programming, (2) number of subscribers, and (3) actual viewing patterns. In my opinion, from an economic point of view, the best methodology based on available data for allocating royalties in the Distribution Phase is the one that is based on actual viewing patterns. I discuss in more detail below why actual viewership rather than hours of programming or number of distant subscribers is a more reliable method of allocating royalties.

A. Volume is not a reliable methodology to allocate royalties, because it does not accurately measure relative market value.

18. The other methods may provide insights in this matter, but are not what determines the relative market value of a program. A methodology based on volume is not a reliable method because viewers and Operators may value a 30-minute program more than they value a 90-minute program.¹⁰ This “utility” or satisfaction one receives from a choice made, such as watching a program is not necessarily determined by the length of the program. Given that the “quality” of the content and the time slot when a show is broadcast (e.g., prime time vs. 3:00 in the morning) are significant drivers of “demand”, and that the demand for a program will certainly be a determinant of the relative market value of the program, a determination of relative market value should not be based on total hours or total number of programs.¹¹

B. Number of subscribers is not a reliable methodology to allocate royalties because it does not accurately measure relative market value of particular programs

19. The methodology based on the number of subscribers is not a reliable method for allocating shares in the Distribution Phase, either. As argued in prior proceedings, Operators are profit maximizing entities that construct bundles (or packages) of channels to attract and retain subscribers. Accordingly, the revenues of an Operator can be attributed to different types of programming that drive subscriptions to the bundle. This is consistent with the Bortz Surveys conducted to measure the relative market value of different types of programming from a

¹⁰ This is also discussed by the Judges in “Distribution of 1998 and 1999 Cable Royalty Funds,” Docket No. 2008-1 CRB CD 98-99 (Phase II), 80 Fed. Reg. 13423, 13441 (Mar. 13, 2013) (“1998-1999 Distribution Order”). .

¹¹ Similarly, from an Operator’s perspective, with rare exception, programs that are not scheduled on a regular basis are less likely to drive subscriptions than regularly scheduled programs (such as the ones captured by the Nielsen reports). Moreover, absent proof that a non-regularly scheduled program is the rare exception, excluding it from our methodology is appropriate.

cable operator's perspective, whose business assessments are analogous to a satellite operator's, particularly because cable and satellite services are in direct competition for subscribers. Hence, the Bortz Surveys are relevant for Allocation Phase of the proceedings which determine the shares of the eight types of programming. However, the Distribution Phase of the proceedings deals with different programs that belong to the same category (e.g., Devotional), which are similar (or homogeneous). Because the effect of one religious program over another on the decision to subscribe cannot be determined merely by counting the number of subscribers to signals with many categories of programming, a method of allocating royalties amongst the devotional programs based on numbers of subscribers is not a reasonable allocation method.¹²

20. To demonstrate why the method of using total subscribers is not reliable using a simple example, assume in a hypothetical world that all claimants in the Devotional category are broadcast on the same channel provided nationally by all Operators.¹³ Because all programs are made available to the same (number of) subscribers, a methodology based on number of subscribers would not be able to offer meaningful percentages to allocate royalties among the programs. The only option based on number of subscribers would be to equally distribute the royalties among the programs, which would completely ignore how viewers "value" each show. In other words, the methodology would not be based on the notion of "relative market value" at all.

21. Cable Data Corporation (CDC) collects and analyzes information on Statements of Accounts (SOAs) that cable and satellite providers file with the Licensing Division of the Copyright

¹² See 1998-1999 Distribution Order at 13441.

¹³ It does not matter in how many markets the channel is retransmitted.

Office.¹⁴ The reports from the CDC provide the number of subscribers together with total royalty fees generated for each channel. Based on the same arguments above, the methodology based on subscribers would not be a reliable royalty allocation methodology, either.

22. There are additional reasons why a subscription-based methodology is not reliable. First, subscription is simply an offering of a list of channels to the potential viewers, and subscribers pay a price to have *access* to these channels over a certain period of time. In practice, each subscriber is interested in watching a small share of the available channels and programs even though he/she pays the price set for the “bundle.” As an example, consider a community where grocery store A sells brand X coffee and grocery store B sells brand Y coffee. Coffee brands X and Y sell for the same price. Assume now that grocery store A has thousands of customers per month attracted to grocery store A’s selection of European cheeses, 10 of whom also purchase brand X coffee. Store B, on the other hand, has only a few hundred customers per month all of whom purchase Brand Y coffee. A claim that brand X has a higher relative market value based on the number of customers who patronize store A would clearly miss the mark in this situation. Brand Y coffee clearly has higher “relative market value” - both for the consumers and the grocery store - than brand X coffee given that it is the preferred brand (with higher demand and sales) in this community. The determination of “relative market value” does not depend on how many customers walk through the doors of (or have access to) the grocery store.

¹⁴ I obtained and reviewed these reports covering 2010-2013 for satellite and cable retransmissions.

23. To illustrate further, consider a channel with a copyrighted program, Program Z, which is retransmitted via satellite. Assume that Program Z, broadcast on a particular day and time, has thousands of viewers. Now, consider replacing Program Z with another copyrighted program, Program W, while keeping all other programs on the channel unchanged. Assume that there are no subscribers who watch Program W. The theory suggests that Program Z has higher “relative market value” than Program W because (1) higher demand for commercials around Program Z will increase revenues for the channel,¹⁵ (2) it will increase negotiating power of the channel with the Operators as well as how much the Operators pay the channel to carry the signal, (3) the Operators will have no incentive to carry a signal with Program W, which no subscriber chooses to watch.

C. Actual viewing patterns provide a reliable methodology to measure relative market value

24. What matters in determining the value of particular programs in the Distribution Phase is the actual viewing patterns of the subscribers. The concept of relative market value of a copyrighted program distantly retransmitted on cable or satellite is no different from the relative market value of a program retransmitted in the local market. What matters from both the channel’s and Operator’s point of view is the “demand” for the program, which is best measured by viewership. If the viewers do not “value” a particular show, one would expect that show not to survive when profit-maximizing firms are involved. We commonly hear about TV shows that are cancelled after a few episodes because the “ratings” were very low.

¹⁵ It is plausible that organizations that consider paying the channel for such commercials also are profit-maximizing entities, and that their rationale for purchasing commercial time is related to the actual or expected viewership of the program.

25. Nielsen is a well-known organization that conducts national research and publishes information on program ratings. This information, which is reliable and relevant to determine the relative market value of programs, is frequently used by profit-maximizing sellers and purchasers of advertisement time. The viewing pattern of households is clearly the most important factor driving the decisions in the television industry. The Nielsen Diary data is collected during one-week periods over four “sweep” months every year (February, May, July, and November). During these months, Nielsen mails seven-day diaries to homes to measure what was watched on each TV set and these data are then aggregated into Nielsen’s database.¹⁶ The Nielsen Reports on Devotional Programming (also known as Nielsen Diary Data) include tables, known as Households and Persons Ranking Tables (R-7), that provide a ranking of devotional programming sorted by average *local* rating (defined as the percentage of households that viewed the program during the sweep periods, on average).¹⁷

26. Importantly, it is my understanding that Nielsen Diary, or “sweep,” data has significant advantages over the “metered” data. Diary data collected during the four “sweep” months collects data from every market, and covers far more households than metered data. Although metered data is collected year round, it is not collected in all geographical areas, and it utilizes far fewer households than diary data. It is my understanding that market participants generally value diary data over metered data, because it is more reliable, more

¹⁶ Direct Testimony of Paul B. Lindstrom, In the Matter of Distribution of the 2000, 2001, 2002, 2003 Cable Royalty Funds.

¹⁷ The numerator is the number of households tuned in to the channel with the specific program and the denominator is the number of households with access to the channel with the specific program (i.e., coverage).

accessible, has more complete coverage, and is potentially less infected by geographical bias.¹⁸

27. It is my understanding that the viewership data from Nielsen has been used in previous proceedings and deemed the most important factor in determining the allocation of royalties in Phase II (or now the Distribution Phase).

“Therefore, a methodology that uses viewership as an indicium of program value is reasonable, appropriate, and consistent with recent precedent in distribution proceedings.”¹⁹

As I argue above, this is consistent with the notion of relative market value in economic theory.

D. Implementation of the Shapley Value Methodology is Impossible

28. In their 1999 distribution decision, the Judges suggested that a Shapley Value Methodology would be more ideal. In theory, more precise or optimal royalty share allocation could have been possible using an approach that is based on the Shapley Value. If sufficient data and computing power were available, a Shapley methodology could allow us to calculate average marginal contribution (or value) of each program claimed by SDC or MGC over all potential orderings of the claimed programs that are retransmitted distantly by an Operator.²⁰

29. However, as I and other testifying experts have agreed in the past, the data to conduct such an analysis does not exist. We can only observe the “actual” ordering of programs, and we

¹⁸ Direct Testimony of John Sanders, In the Matter of Distribution of 2010-2013 Cable and Satellite Royalty Funds, June 30, 2017.

¹⁹ See 1998-1999 Distribution Order at 13442.

²⁰ 1998-1999 Determination at 13429-13430.

cannot precisely estimate the marginal value of each program (e.g., when SDC and MGC have one claimed program on a given CSO/SO) even in this actual ordering. The “perfect” study or data required to calculate or approximate Shapley Values for the claimed programs simply does not exist to the best of my knowledge. Even if the data existed and were obtainable, it is unlikely that existing computer technology would permit the computation of a true Shapley valuation on any cable or satellite system retransmitting any significant number of stations, because of the immense number of operations required.

30. The best we can do is to glean certain characteristics of what a Shapley valuation would show, if it could be conducted. As I previously testified and as the Judges found, Shapley valuation predicts that ratings underestimate the value of the most highly viewed programs, when comparing programs geared toward similar audiences that have similar levels of overlap among viewers. Since the SDC have consistently had the higher rated programs in these proceedings, this reinforces my conclusion that even as the Nielsen ratings and viewership data provide the closest approximation to how subscribers value specifically claimed programs in the devotional category, which in turn should affect how Operators value these specific, individual programs, they likely understate the relative value of the SDC’s programs compared to MGC’s.

VI. Analyses of Distant and Local Viewing Data

31. It is my understanding that reliable, national distant rating or viewership information from distant markets is not readily available from Nielsen for 2010-2013. As noted above, the Nielsen ratings are reliable measures for determining relative market value, but they are not specifically calculated for programs retransmitted in the distant markets by Operators.

However, unless a program is appealing predominantly to local tastes and culture,²¹ there is no reason to believe that ratings in the local market are significantly different from ratings in the distant markets, on average.

32. Indeed, in reviewing the RODPs, which list the stations and audience for programs that have a broad audience, one sees significant consistency in ratings, regionally and nationally. First, I analyzed the consistency of ratings for claimed programs over all Nielsen sweep months during 1999-2013.²² For programs claimed by SDC or MGC, I calculated how often each program is rated in a given year. **Exhibit 2** shows that particular claimed programs were rated in all sweep months for approximately 77 percent of the time in 2010 and 2012, and 100 percent for 2011 and 2013. Even though the data prior to 2010 is not directly related to this proceeding, **Exhibit 2** shows that the ratings were stable and consistent for all time periods I had access to.

33. Second, I calculated the change in the ratings between any two sweep months of a given year during 2010-2013 for each claimed program.²³ This is simply a calculation of the difference between the rating of a program in two separate sweep months. **Exhibit 3** shows that the change (calculated over 333 comparisons) was at most 0.1 percentage points, approximately 95.2 percent of the time (exactly 0 for 60.7 percent of the time and 0.1 percentage points for 34.5 percent of time time) during 2010-2013. This analysis also shows that the rating of a

²¹ For example, a local church service, carried on a single television station, does not meet Nielsen program reportability standards, and therefore would not be included in the RODPs.

²² These sweep months are February, May, July, and November for each year except for 2009 when the sweep months were March, May, July, and November, and the November 2013 RODP which was not available. Additionally, I did not have access to one sweep in 2000 and two sweeps in 2001, 2002, and 2003.

²³ Because ratings are percentages with one decimal point, the differences can only be 0, 0.1, 0.2, and so on, percentage points with exactly one decimal point.

program was highly stable within a year: There was rarely a change in ratings that was greater than 0.1 percentage points.

34. Third, in order to establish that there is a positive, statistically significant correlation between local and distant ratings (and rely on local ratings in the rest of my report), I performed an analysis using Nielsen distant viewing data (i.e., HHVH) from 1999-2003 that was available to me in prior proceedings. In addition to reporting the correlation coefficient for the relationship between local and distant ratings, I conduct regression analyses relating distant ratings to local ratings. Regression analysis is a widely-accepted statistical tool for the investigation of relationship between a dependent and an independent variable while also controlling for other factors. This tool allows the user to determine whether or not there exists a statistically significant relationship (positive or negative) between any two variables. The estimated coefficient of an independent variable represents the “marginal effect” of that independent variable on the dependent variable. Unlike a correlation analysis, a regression analysis allows the user to include multiple independent variables to “explain” variation (or changes) in the dependent variable.
35. To conduct the regression analysis, I merge the following data sources: (i) 1999-2003 Nielsen distant viewership data (known as household viewing hours (HHVH) data), (ii) 1999-2003 Nielsen rating table (R-7) for ranked programs,²⁴ and (iii) 1999-2003 CDC Statement of Accounts with subscription information. To create a measure of “distant

²⁴ Please note that with respect to Calendar Years 1999-2003, I only had access to the full Nielsen RODPs for the February sweep months. For the other months, I was only provided with the R-7 tables and I did not have access to the pages which describe the reporting standards. Nevertheless, because of the consistency of the reporting standards described in all full reports I have reviewed for 1999-2003 and 2010-2013 (as well as other reports I reviewed in prior proceedings for 2004-2009), Nielsen’s standards and procedures were consistent; therefore, I assume that the same as the ones detailed in the February report of the same year apply throughout the years.

ratings”, I divide the number of households tuned in for the program by the number of distant subscribers for the channels that broadcast the program. This estimate provides a comparable measure to the local ratings in the Nielsen Diary data for the distant markets.²⁵

36. I conduct two sets of regression analyses using distant rating as the dependent variable.²⁶

First, using 60 data points from claimed programs, I estimate three models. In model 1, I include only the local rating as the independent variable. In model 2, I include a trend variable for 1999-2003, in addition to the local rating. In model 3, I include year dummies, in addition to the local rating. Second, I re-estimate the same three models using 104 data points from all programs (not only the ones claimed by SDC or IPG/MGC) over the same time period. Given that these programs are relatively homogeneous, including observable (and objective) program-specific factors would not affect the results in a significant way. Also, because ratings are calculations over many stations, including station-specific factors is not feasible.

37. **Exhibit 4** provides the results from the regression analyses where the first column shows the independent variables, next three columns show the coefficient estimates and the standard errors for the three models that are based on claimed programs, and the last three columns show the coefficient estimates and the standard errors for the three models that are based on all programs. The coefficient estimates that are statistically significant are denoted by * or

²⁵ Note that this measure is not necessarily the equivalent of Nielsen local rating for the distant markets, but a comparable measure that divides viewership data by the population size.

²⁶ Because programs with zero local rating are not included in the Nielsen RODPs, I exclude programs with no reported distant viewing (i.e., HHVH of zero hours) as well. However, I repeat the analyses by including programs with no reported distant viewing and find that the impact on estimated coefficients is minimal. The statistical significance of the findings and my conclusions do not change.

^{**}, for 5 percent and 1 percent significance levels, respectively, in the exhibit.²⁷ For all three models that are based on the claimed programs over 1999-2003, I find that the coefficient for the local rating measure is positive (0.008) and statistically significant for all three models (no covariate, trend variable, and year dummies, respectively).²⁸ When I repeat the estimation using all programs over the same time period, I get similar and consistent results: The coefficient for the local rating measure is positive and statistically significant for all three models. This analysis indicates a strong positive relationship between local ratings and distant viewership calculated as a percentage of distant subscribers. The correlation coefficient for the 60 data points from claimed programs during 1999-2003 is 0.79 and it is statistically significant.²⁹

38. In the two additional models where I test if the distant ratings change over time or by year, I find that the coefficients for the trending term and year dummies are not statistically significant. That is, after controlling for local ratings, distant ratings appear to be consistent and stable over 1999-2003.

39. These statistical findings are confirmed by the experience-based testimony of industry professionals like John Sanders and Toby Berlin,³⁰ who have informed me that local ratings

²⁷ A coefficient estimate that is statistically significant at the 1 percent significance level is a “better” result than a coefficient estimate that is statistically significant at the 5 percent significance level.

²⁸ Note that the objective of this analysis is to establish the positive and statistically significant relationship between distant and local ratings. The magnitude of the regression coefficient, which would depict how much the dependent variable moves with a unit change in the independent variable (known as the marginal effect), is not relevant. Also, R-squared values range between .63 and .64, depending on the model, and are reasonable. In this analysis, the R-squared simply explains how much of the variation in distant rating is explained by the included independent variables.

²⁹ I present the correlation coefficient as additional evidence, as well as for completeness. There is no accompanying exhibit for this statistic.

³⁰ Direct Testimony of John Sanders, In the Matter of Distribution of 2010-2013 Cable and Satellite Royalty Funds, June 30, 2017. Direct Testimony of Toby Berlin, In the Matter of Phase II Distribution of 2004-2009 Cable and 1999-2009 Satellite Royalty Funds, May 9, 2014. Supplemental Testimony of Toby Berlin, In the Matter of Phase II Distribution of 2004-2009 Cable and 1999-2009 Satellite Royalty Funds, August 16, 2017.

are regarded as a reliable indicator of value, even when ratings in the distant market are not available. In my experience as an economist, the experience of industry professionals cannot simply be ignored, for two reasons: (1) not all knowledge is based on data analysis – common sense and experience play an important role, and (2) how actual industry players solve real-life problems in the absence of perfect data is a reasonable guide as to how hypothetical industry players would resolve similar problems in a hypothetical market.

40. These findings allow me to use the local ratings as a measure of cable and satellite retransmission ratings in the royalty allocation methodology below. They additionally allow me to conclude that local ratings can be used throughout 2010-2013 given the lack of evidence for trends or year fixed effects.

VII. Royalty Allocation for the Devotional Category

41. In the absence of any distant ratings data and given that Nielsen ratings include households with both cable and satellite service, Nielsen local ratings can be used as a reasonable proxy for cable and satellite ratings. In addition, I have no reason to believe that the viewing preferences of satellite subscribers differ systematically from cable subscribers.
42. There are two other issues with the Nielsen ratings which may require further analyses. First, there are a few shows that are included in the rankings, but whose ratings are too small to report. These shows, which have average ratings of less than 0.1 percent, have a rating of “LT.” Second, not all devotional programs are included in the Nielsen rankings due to the program and station reportability standards set by Nielsen or because they were not ranked due to Nielsen reporting standards.

VIII. Combining Data Files

43. To provide estimates of relative market value of retransmitted programs by SDC and MGC claimants, I rely on both Nielsen Reports on Devotional Programs for ratings and CDC SOAs for number of distant subscribers for 2010-2013. As noted above, R-7 tables in Nielsen Reports (“Nielsen Ratings”) provide reliable estimates of national average ratings by program title in each sweep. Additionally, “Market Audience Estimates for Devotional Programs” section of the Nielsen Reports (“Nielsen Audience”) provides market-level data on average number of households who viewed each program. If the average rating for a program is missing from the Nielsen Ratings data, then it can be calculated (or estimated) as the sum of number of households from the Nielsen Audience data divided by the number of households in the covered markets (known as “projected coverage” in Nielsen R-7).³¹
44. To create a distant ratings measure and compare with local ratings, I combine Nielsen Audience data, Nielsen Ratings data, and CDC SOAs as follows: First, I merge the Nielsen Audience data with the CDC SOA data by year and channel. Then, I keep only the records that merge and exclude the rest from my analysis. The excluded records consist of programs that were broadcast on channels that were not distantly retransmitted (with no royalty payments) and channels from CDC data that did not broadcast any of the claimed programs. Then, I aggregate the number of households (from Nielsen Audience data) and distant subscribers by year and program title by summing over the channels. Finally, I merge this combined data with the Nielsen Ratings data by year and program title.

³¹ The estimated value for rating is expected to be less than or around 0.1 percent.

IX. Steps of the Royalty Allocation Methodology

45. I provide the details of my royalty allocation methodology in a few straightforward steps. I

denote the average national rating of a program by $Ave_Rtg_{it}^k$ where i represents each program title claimed by claimant k (SDC or MGC) in year t .³² The number of shows claimed by each claimant k in year t is represented by N_t^k . The steps of the methodology are as follows:

Step 1: To impute the missing rating information (those with “LT”) for a few shows claimed by SDC and MGC, calculate the ratings information using the values provided in the Nielsen Ratings and Nielsen Audience data.³³ Specifically, I estimate the rating by dividing the number of households by the projected coverage in Nielsen sweep markets. This allows me to improve the coverage of my allocation estimates. This step only affects the programs “James Robison Life Today” (claimed by MGC) for a total of 4 years for cable and 2 years for satellite during 2010-2013, “Kenneth Copeland” (claimed by MGC) for 1 year for cable in 2013, and “Kenneth Copeland Daily” (claimed by MGC) for 1 year for cable and 1 year for satellite in 2013.³⁴

³² For purposes of this analysis, I assume that all MGC program claims are valid and have been sustained by the Judges after challenge. To the extent the Judges sustain the SDC’s motion to disqualify MGC or dismiss one or more claims, then my conclusions will have to be revisited, and all claims or programs denied valid claimant status must be removed from the analysis.

³³ The total numbers of households that view the program on each channel are available in column 13 of the detailed program data in these reports. The total number of households that view the program divided by the number of total households in the Nielsen sweeps (i.e., projected coverage in the market area) would produce the average rating.

³⁴ Imputing small values (less than 0.1 percent) instead provides very similar results with no significant effect on the resulting shares.

Step 2: Calculate the total distant viewers for SDC and MGC programs in each year by multiplying the average ratings by the number of subscribers for channels the relevant SDC and MGC programs are broadcast on, and summing over all such programs:

$$Viewer_t^k = \sum_{i=1}^{N_t^k} [Subscriber_{it}^k * Ave_Rtg_{it}^k] + Adjustment_t^k \quad k = SDC, IPG \quad (1)$$

where t ranges between 2010 and 2013 and subscript i represents each program title claimed by claimant k . This step measures the number of U.S. households tuned in to any of the programs claimed by SDC and MGC in a given year. This amount can be adjusted to account for claimed program titles (for both SDC and MGC) that are not included in Nielsen ratings, denoted by $Adjustment_t^k$, for year t and claimant k . This step is necessary to account for all claimed programs in the royalty allocation methodology, but requires additional data.³⁵

Step 3: Using the estimate of distant viewers, calculate the share of royalties, for example, for SDC by:

$$Share_t^{SDC} = \frac{Viewer_t^{SDC}}{Viewer_t^{SDC} + Viewer_t^{IPG}} \quad (2)$$

where t ranges between 2010 and 2013.

A. Royalty Estimates under my Proposed Methodology

46. In order to implement the above methodology, I had access to claimed programs from both SDC and MGC. As content on WGNA is frequently altered compared to WGN, I analyzed

³⁵ It is logical to assume that the share of royalties for a given party (SDC or MGC) should increase with the number of claimed programs.

the Tribune data for compensability of programs claimed by SDC and MGC.³⁶ I found that none of the programs claimed by MGC carried on WGN-WGNA were compensable during 2010-2013. By contrast, there were two compensable religious program series claimed by the SDC; however, neither appeared in the Nielsen Diary Data (i.e., not available in Nielsen R-7 tables) during 2010-2013.³⁷

47. The royalty shares are presented in **Exhibit 5**. The average shares for the SDC are 83 and 88 percent during 2010-2013 for cable and satellite, respectively. The satellite royalty allocations for MGC are materially lower in 2011-2013 than the cable royalty allocations because its claimants' programs generally did not appear on the stations that were most highly retransmitted in satellite, demonstrating why coupling ratings with distant subscribers is more appropriate to establish relative market value (because ratings alone do not take into account that not all programs are retransmitted equally, or at all, in distant markets).
48. In **Exhibit 6**, I also analyze the contribution of each claimed program on the royalty shares in Exhibit 5 together with how frequently they are ranked in RODPs during 1999-2013 and TV coverage across the US during 2010-2013. Even though distant viewership data for specific stations are not available, this analysis can provide additional evidence that programs relevant for this proceeding are viewed nationally on numerous stations and markets. During 2010-2013, programs that have relatively high ratings and/or distant subscribers (i.e., significant contribution to royalty shares in my proposed methodology) are "Joel Osteen", "In Touch 60", and "700 Club" for SDC and "Jack Van Impe Presents", "Kenneth Copeland Daily", and "Creflo A. Dollar, Jr." for MGC. For example, "Joel Osteen" has consistently

³⁶ A program is considered compensable if the same broadcast airs on WGN and WGNA at the same time and for the same duration.

³⁷ These programs are *Bill Winston* (aka *Believers Walk of Faith*) for 2010 and *Tomorrow's World* for 2012-2013.

(and continuously) been one of the top ranked devotional programs based on national ratings since 2003. It's been available and viewed on between 40 and 50 stations nationally during 2010-2013. In over 80 percent of these stations, the program had at least five thousand viewers in any given sweep month. Similarly, "In Touch 60", "700 Club", and "Jack Van Impe Presents" have been ranked in every Nielsen sweep between 1999 and 2013, and have been viewed on hundreds of stations nationally during 2010-2013. This analysis allow me to deduce that these programs could have had similar viewership patterns had they been distantly transmitted to another US market for a specific station or list of stations.

B. Additional Analyses with Supplemental Nielsen Data

49. The Supplemental Nielsen Data does not provide average national ratings for the program titles as set forth in the RODP, nor does it retain the key reportability requirements common to all RODPs. It should be noted that the total impressions for programs claimed by SDC or MGC that do not appear in the RODPs is a small fraction of the whole as they represent about 26% of the total impressions. I also noticed that most of the programs missing from the RODPs averaged about 24,000 impressions, and many had only a few hundred or even none at all. This is not surprising in view of the limitations inherent in Nielsen sweep data, as previously testified to by Nielsen's Paul Lindstrom. The number of impressions stands in contrast to the household viewing statistics for the programs within the RODPs, which average about 180,000 impressions nationwide, and include some programs with over 1,000,000 impressions nationwide. Therefore, on the whole, with only a couple of exceptions, the programs missing from the ROPDs represent programs of limited importance to share allocations in this proceeding.

50. The Supplemental Nielsen Data has significant limitations. First, it includes data from all channels that carry a particular program based on data gathered by the diary methodology in some DMAs and the meter methodology in some others. Hence, it is a mix of information from local as well as distant markets, and ratings from distant markets that rely on the meter methodology is not reliable due to sample sizes. The ratings from distant markets is problematic also because Nielsen's methodology assumes that everyone in the DMA has access to the station. This assumption is expected to be very close to the truth in local markets for a given station, but it can lead to imprecise estimates of ratings and viewership outside the station's DMA. The presence of less accurate, non-local rating information in this data reduces the value of the entire database. Second, there is no easy and straightforward way of separating the local and non-local stations within the same DMA, which I confirmed this with Nielsen in our discussions. Third, the information on how the RODPs can be replicated with the Supplemental Nielsen Data is not readily available. As a result, I consider the local ratings information from the RODPs as more robust and reliable for the purposes of this proceeding even though the Supplemental Nielsen Data appears to be more comprehensive in terms of the number of programs included.

51. Nevertheless, I used the Supplemental Nielsen Data to better understand (at least directionally) the viewership for SDC and MGC programs that are not in the RODPs. By comparing the total estimates of viewing of SDC and MGC programs that do not appear in the RODPs, I determined that the relative number of impressions for these additional programs substantially favored SDC, as I detailed in **Exhibit 7**. These results support the conclusion that the implied shares based on impressions of programs not appearing in the RODP is higher for the SDC than the corresponding implied shares for MGC. This confirms

my expectation that if the programs missing from the RODPs were measured, they would marginally increase the SDC share. Therefore, the shares implied by the RODPs (Exhibit 5) should represent a floor, for a “zone of reasonableness” for the SDC’s distribution.

52. As a sensitivity analysis, I employed my methodology using the ratings implied by the Supplemental Nielsen Data rather than using the local ratings from the Nielsen RODPs. *See Exhibit 8.* This sensitivity analysis, coupled with my conclusions based on total impressions of the programs missing from the RODPs, reinforces my conclusion that the SDC shares based on the methodology using the RODPs should be a floor for the SDC within a “zone of reasonableness.”

C. Additional Regression Analyses

53. Given that the judges have indicated that viewership can be a reasonable and directly measurable metric for calculating relative market value, I conduct additional analyses to support the findings under my proposed methodology. Specifically, using HHVH data that is available for 1999-2003, I estimate a regression model to characterize the relationship with distant viewership (i.e., HHVH) and observable market data, such as local ratings, number of distant subscribers, and controls for year and time trends.³⁸ This regression is different from the regression analysis presented in Exhibit 4 as it uses HHVH directly as its dependent variable rather than correlating distant ratings with local ratings.

54. Based on the regression coefficient estimates, which quantify the marginal effect of each variable (e.g., number of distant subscribers) on distant viewership, I then predict distant viewership using market data for 2010-2013. **Exhibit 9** provides the results from the

³⁸ I also estimated additional models that include total subscribers and number of stations that carry each program as other independent variables. The estimated coefficients for these variables were insignificant.

regression analyses where the first column shows the independent variables, next four columns show the coefficient estimates and the standard errors for the different models that are based on claimed programs. The coefficient estimates that are statistically significant are denoted by * or **, for 5 percent and 1 percent significance levels, respectively, in the exhibit. The results indicate that there is a statistically significant and positive relationship between distant viewership and local ratings and total distant subscribers. Similar to the findings in the previous regression analysis, I find that the coefficients for the trending term and year dummies are not statistically significant.

55. Using the estimates from the regression analysis with HHVH data for 1999-2003 and market data from 2010-2013, I then predict distant cable viewership using the model with statistically significant covariates (i.e., Model 2 in Exhibit 8). As demonstrated in **Exhibit 10**, royalty shares that are based on predicted distant viewership are similar to the royalty shares that are based on my proposed methodology (Exhibit 5), but on average higher for SDC. This regression/prediction analysis provides additional evidence that the shares implied by my methodology (Exhibit 5) represent a floor for the SDC's distribution.

X. Conclusion

56. In this report, I provided analyses that show the following:

- Nielsen local rating data is reliable and consistent over time based on RODPs covering 1999-2013 (Exhibits 2 and 3).
- There is a positive and statistically significant relationship between local and distant ratings based on data from 1999-2003 (Exhibit 4).

- There is no significant change (or trend) in distant ratings or viewership over time based on data from 1999-2003 (Exhibits 4 and 9).
- Based on these findings and lack of reliable, distant viewing data for 2010-2013, I present a model that combines local ratings with distant subscribers for royalty share calculations for 2010-2013 (Exhibit 5).
- The claimed programs relevant to this proceeding, especially main drivers of royalty shares for SDC and MGC, are almost always rated since 1999. These programs have been available nationally across numerous stations and markets with thousands of viewers during 1999-2013 (Exhibit 6). There is no reason to believe that they would not have similar viewership patterns for distantly retransmitted stations.
- The analysis with the Supplemental Nielsen Data show that the programs that do not appear in RODPs imply higher royalty shares for the SDC in every year (Exhibits 7 and 8). Hence, the SDC's royalty shares from my proposed methodology (Exhibit 5) represent a floor for the SDC.
- An alternative model that I develop to predict distant viewership data (HHVH) for 2010-2013 using a regression model produces similar results in terms of royalty shares as my proposed model (Exhibits 9 and 10).

57. The CRB also has indicated that viewership-based models of valuation are consistent with Library precedent and "relative market value" could be made by reliance on viewership information when a more optimal valuation tool was not available.

58. My proposed share allocations for the SDC, which I deem a floor, are the following:

Royalty Distribution for SDC Claimants

Year	SDC Cable share (%)	SDC Satellite share (%)
2010	77.1	75.3
2011	82.6	88.3
2012	84.8	90.7
2013	89.1	97.7

Note: Values subject to rounding.

59. Thank you for the opportunity to present my analyses. I hope they will be useful in the proceeding.

XI. Declaration of Erkan Erdem

60. I declare under penalty of perjury that the foregoing testimony is true and correct, and of my personal knowledge.

Executed on December 22, 2017



Erkan Erdem

Exhibit 1. Curriculum Vitae



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Function and Specialization

Dr. Erkan Erdem is a Managing Director in KPMG's Economic and Valuation Services (EVS) practice. Dr. Erdem has ten years of research and consulting experience. He assists KPMG's clients with economic analyses.

Representative Clients

- Maryland Health Services Cost Review Commission (HSCRC)
- New York State Department of Health
- CMS, CMMI

Background

Dr. Erdem is an expert in program evaluation, policy analysis, statistical modeling, econometrics, and data analytics. He has extensive experience with Medicare payment systems and health care claims data. He teaches graduate-level econometrics at University of Maryland as an Adjunct Professor.

Testifying Experience

- In the Matter of Phase II Distribution of the 1998 and 1999 Cable Royalty Funds, Docket No. 2008-1 CRB CD 1998-1999 (Phase II) (Copyright Royalty Board).
- In the Matter of Phase II Distribution of the 2004-2009 Cable Royalty Funds, Docket No. 2012-6 CRB CD 2004-2009 (Phase II) (Copyright Royalty Board).
- In the Matter of Phase II Distribution of the 1999-2009 Satellite Royalty Funds, Docket No. 2012-7 CRB SD 1999-2009 (Phase II) (Copyright Royalty Board).
- In re Distribution of the 2010-2013 Cable Royalty Funds, Consolidated Proceeding, Docket No. 14-CRB-0010-CD (2010-2013) (Copyright Royalty Board).

Professional and Industry Experience

- Assisting the Centers for Medicare & Medicaid Services (CMS) Office of Minority Health (OMH) with data analytic support related to identifying high risk populations and reducing health disparities for minority and disadvantaged populations.
- Assisted the Center for Consumer Information and Insurance Oversight (CCIIO) with the review and evaluation of the financial performance of the State-based Marketplaces (SBMs).

- Administration on Aging

Professional Associations

AEA, APHA, ASA, and AcademyHealth

Languages

English, Turkish

Education, Licenses & Certifications

- PhD in economics from The Pennsylvania State University
- BS in mathematics and BA in economics from Koç University, Istanbul

Programming Skills

- Matlab, STATA, Gauss, SAS, and C
- Tableau

- Assisted CCIIO with verification of employer-sponsored coverage (ESC) and analysis of advance payments of the premium tax credits (APTC) granted for health coverage purchased through the Federally-facilitated Marketplace.
- Assisted The State of Maryland, Health Services Cost Review Commission (HSCRC) with its implementation of the state's All-Payer Model as part of the new Medicare waiver with the CMS.
- Supported the New York State Department of Health (NYDOH) Delivery System Reform Incentive Payment (DSRIP) Program with community needs assessments and definition of target populations for healthcare providers' project plan applications.
- Population-based analysis of healthcare utilization using Medicaid and all-payer claims databases for New York State Department of Health. Analyzed cost and quality of care measures at the provider- and county-level to assess the needs of the population in a “value” based approach.
- Led the technical efforts in the Comparative Effectiveness Research (CER) Public Use Data Pilot Project for the Centers for Medicaid & Medicare Services (CMS) to create de-identified Public Use files (PUFs) using Medicare claims data. Led a team of economists and statisticians to generate samples of Medicare beneficiaries, link and process enrollment and claims data sets, and apply various statistical disclosure limitation techniques to prepare analytic files that meet HIPAA standards.
- Led the design of the methodology for the calculation of baseline and benchmark Medicare Fee-for-Service (FFS) expenditures in the Comprehensive End-Stage Renal Disease (ESRD) Care (CEC) Initiative for the Center for Medicare & Medicaid Innovation (CMMI). Reviewed and synthesized payment models in the Medicare Shared Savings Program (SSP) and Pioneer Accountable Care Organization (ACO) Model as part of the task.

- Conducted monitoring and evaluation of the Bundled Payments for Care Improvement Initiative (BPCI) for CMMI with a focus on services provided around the acute care hospital stay (i.e., episode of care). Statistically identified diagnoses with a potential to generate savings and designed various cost and utilization measures to assess the performance of the initiative compared to appropriate benchmarks.
- Conducted a rapid-cycle evaluation of the Community-based Care Transitions Project (CCTP) for CMS to assess the impact of the program on continuity of care and outcomes, including readmissions, emergency visits, medication errors, costs, and patient satisfaction.
- Led the project for a simulation-based cost-benefit analysis of school-based influenza vaccination programs for a private biopharmaceutical company.
- Conducted the process evaluation of the Chronic Disease Self-Management Program (CDSMP) for the Administration on Aging (AoA) and analyzing the determinants of completion rates using participant-level data.
- Evaluated the performance of over 1,000 hospitals in the U.S. in the National Content Developer Project for CMS. The data elements cover patient safety culture, measurement of health care processes and outcomes, infection control, procedures, medications, nursing practices, communication.
- Investigated the response rates in the Consumer Assessment of Healthcare Providers and Systems (CAHPS) survey using a predictive regression model and reported the findings to CMS with recommendations for future surveys.
- Provided analyses for the liability and the damages experts for AMD Inc. in the exclusionary conduct litigation of Intel Corp. (AMD Inc. vs. Intel Corporation).
- Estimated damages to

- Novell, Inc. in the Microsoft monopolization litigation (In re Microsoft Corp. Antitrust Litigation).
- Purchasers in the price-fixing litigation of global rubber chemicals manufacturers (In re Rubber Chemicals Antitrust Litigation).
- Purchasers of hypodermic products in a foreclosure litigation involving a major medical supplies company.
- Analyzed the competitive effects of a merger in the
 - Oil refining industry in the U.S.
 - Liquor distribution industry in the U.S.
- Developed a methodology and a simulation model to estimate damages in Section II (i.e., monopolization) cases.
- Provided economic analyses related to the calculation of water price in an international arbitration case.
- Analyzed market power of Shell Trading Gas & Power Company in proceedings before the Federal Energy Regulatory Commission (FERC).
- Conducted a review of the econometric modeling in the Enron bankruptcy litigation.

Publications and Research Papers

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Exhibit 2. Consistency of Local Ratings – Being Ranked

Year	Rated In All Sweeps		Missing in One Sweep		Missing in Two Sweeps		Missing in Three Sweeps	
	Frequency	%	Frequency	%	Frequency	%	Frequency	%
1999	12	100.00	0	0.00	0	0.00	0	0.00
2000	18	100.00	0	0.00	0	0.00	0	0.00
2001	18	94.74	1	5.26	0	0.00	0	0.00
2002	17	89.47	2	10.53	0	0.00	0	0.00
2003	15	88.24	2	11.76	0	0.00	0	0.00
2004	14	93.33	0	0.00	0	0.00	1	6.67
2005	16	94.12	0	0.00	0	0.00	1	5.88
2006	15	83.33	2	11.11	0	0.00	1	5.56
2007	15	71.43	2	9.52	1	4.76	3	14.29
2008	13	72.22	2	11.11	1	5.56	2	11.11
2009	15	88.24	0	0.00	1	5.88	1	5.88
2010	17	77.27	1	4.55	2	9.09	2	9.09
2011	17	100.00	0	0.00	0	0.00	0	0.00
2012	13	76.47	2	11.76	1	5.88	1	5.88
2013	13	100.00	0	0.00	0	0.00	0	0.00
Total	228	87.69	14	5.38	6	2.31	12	4.62

Exhibit 3. Consistency of Local Ratings – Change in Ratings over Time

Year	Months of Comparison	Equal To Zero		0.1 Percentage Points		0.2 Percentage Points		0.3 Percentage Points		Total
		Frequency	Percent	Frequency	Percent	Frequency	Percent	Frequency	Percent	
1999	February to May	9	75.00	3	25.00	0	0.00	0	0.00	12
	February to July	8	66.67	2	16.67	2	16.67	0	0.00	12
	February to November	6	50.00	5	41.67	0	0.00	1	8.33	12
	May to July	7	58.33	5	41.67	0	0.00	0	0.00	12
	May to November	8	66.67	3	25.00	1	8.33	0	0.00	12
	July to November	6	50.00	5	41.67	0	0.00	1	8.33	12
	Total	44	61.11	23	31.94	3	4.17	2	2.78	72
2000	February to May	10	55.56	5	27.78	2	11.11	1	5.56	18
	February to July	9	50.00	5	27.78	4	22.22	0	0.00	18
	May to July	12	66.67	5	27.78	1	5.56	0	0.00	18
Total		31	57.41	15	27.78	7	12.96	1	1.85	54
2001	February to November	10	55.56	8	44.44	0	0.00	0	0.00	18
Total		10	55.56	8	44.44	0	0.00	0	0.00	18
2002	February to July	7	41.18	8	47.06	1	5.88	1	5.88	17
Total		7	41.18	8	47.06	1	5.88	1	5.88	17
2003	February to May	6	40.00	7	46.67	1	6.67	1	6.67	15
Total		6	40.00	7	46.67	1	6.67	1	6.67	15
2004	February to May	6	42.86	8	57.14	0	0.00	0	0.00	14
	February to July	6	42.86	8	57.14	0	0.00	0	0.00	14
	February to November	6	42.86	8	57.14	0	0.00	0	0.00	14
	May to July	10	71.43	4	28.57	0	0.00	0	0.00	14
	May to November	9	64.29	4	28.57	1	7.14	0	0.00	14
	July to November	5	35.71	8	57.14	1	7.14	0	0.00	14

Year	Months of Comparison	Equal To Zero		0.1 Percentage Points		0.2 Percentage Points		0.3 Percentage Points		Total
		Frequency	Percent	Frequency	Percent	Frequency	Percent	Frequency	Percent	
Total		42	50.00	40	47.62	2	2.38	0	0.00	84
2005	February to May	10	62.50	5	31.25	1	6.25	0	0.00	16
	February to July	8	50.00	7	43.75	1	6.25	0	0.00	16
	February to November	8	50.00	7	43.75	0	0.00	1	6.25	16
	May to July	9	56.25	6	37.50	1	6.25	0	0.00	16
	May to November	8	50.00	6	37.50	1	6.25	1	6.25	16
	July to November	5	31.25	9	56.25	2	12.50	0	0.00	16
Total		48	50.00	40	41.67	6	6.25	2	2.08	96
2006	February to May	9	52.94	7	41.18	0	0.00	1	5.88	17
	February to July	7	43.75	8	50.00	0	0.00	1	6.25	16
	February to November	9	56.25	7	43.75	0	0.00	0	0.00	16
	May to July	11	68.75	5	31.25	0	0.00	0	0.00	16
	May to November	8	50.00	8	50.00	0	0.00	0	0.00	16
	July to November	8	53.33	7	46.67	0	0.00	0	0.00	15
Total		52	54.17	42	43.75	0	0.00	2	2.08	96
2007	February to May	10	62.50	6	37.50	0	0.00	0	0.00	16
	February to July	7	43.75	7	43.75	2	12.50	0	0.00	16
	February to November	7	46.67	7	46.67	1	6.67	0	0.00	15
	May to July	9	52.94	7	41.18	1	5.88	0	0.00	17
	May to November	8	50.00	8	50.00	0	0.00	0	0.00	16
	July to November	9	52.94	6	35.29	2	11.76	0	0.00	17
Total		50	51.55	41	42.27	6	6.19	0	0.00	97
2008	February to May	6	40.00	9	60.00	0	0.00	0	0.00	15
	February to July	5	31.25	10	62.50	1	6.25	0	0.00	16
	February to November	4	30.77	9	69.23	0	0.00	0	0.00	13

Year	Months of Comparison	Equal To Zero		0.1 Percentage Points		0.2 Percentage Points		0.3 Percentage Points		Total
		Frequency	Percent	Frequency	Percent	Frequency	Percent	Frequency	Percent	
	May to July	10	66.67	5	33.33	0	0.00	0	0.00	15
	May to November	10	76.92	3	23.08	0	0.00	0	0.00	13
	July to November	9	69.23	3	23.08	1	7.69	0	0.00	13
	Total	44	51.76	39	45.88	2	2.35	0	0.00	85
2009	March to May	9	60.00	6	40.00	0	0.00	0	0.00	15
	March to July	10	66.67	3	20.00	1	6.67	1	6.67	15
	March to November	10	66.67	5	33.33	0	0.00	0	0.00	15
	May to July	9	60.00	4	26.67	2	13.33	0	0.00	15
	May to November	9	60.00	5	33.33	1	6.67	0	0.00	15
	July to November	10	66.67	5	33.33	0	0.00	0	0.00	15
Total		57	63.33	28	31.11	4	4.44	1	1.11	90
2010	February to May	11	55.00	8	40.00	0	0.00	1	5.00	20
	February to July	5	27.78	13	72.22	0	0.00	0	0.00	18
	February to November	9	52.94	7	41.18	1	5.88	0	0.00	17
	May to July	10	55.56	6	33.33	2	11.11	0	0.00	18
	May to November	10	58.82	7	41.18	0	0.00	0	0.00	17
	July to November	12	70.59	5	29.41	0	0.00	0	0.00	17
Total		57	53.27	46	42.99	3	2.80	1	0.93	107
2011	February to May	13	76.47	2	11.76	2	11.76	0	0.00	17
	February to July	13	76.47	3	17.65	1	5.88	0	0.00	17
	February to November	8	47.06	8	47.06	1	5.88	0	0.00	17
	May to July	14	82.35	3	17.65	0	0.00	0	0.00	17
	May to November	9	52.94	8	47.06	0	0.00	0	0.00	17
	July to November	10	58.82	7	41.18	0	0.00	0	0.00	17
Total		67	65.69	31	30.39	4	3.92	0	0.00	102
2012	February to May	8	53.33	6	40.00	1	6.67	0	0.00	15

Year	Months of Comparison	Equal To Zero		0.1 Percentage Points		0.2 Percentage Points		0.3 Percentage Points		Total
		Frequency	Percent	Frequency	Percent	Frequency	Percent	Frequency	Percent	
	February to July	10	66.67	4	26.67	1	6.67	0	0.00	15
	February to November	7	53.85	4	30.77	2	15.38	0	0.00	13
	May to July	11	73.33	4	26.67	0	0.00	0	0.00	15
	May to November	8	57.14	5	35.71	1	7.14	0	0.00	14
	July to November	9	69.23	3	23.08	1	7.69	0	0.00	13
Total		53	62.35	26	30.59	6	7.06	0	0.00	85
2013	February to May	8	61.54	5	38.46	0	0.00	0	0.00	13
	February to July	7	53.85	5	38.46	1	7.69	0	0.00	13
	May to July	10	76.92	2	15.38	1	7.69	0	0.00	13
Total		25	64.10	12	30.77	2	5.13	0	0.00	39

Exhibit 4. Regression Analysis Results

Dependent variable: Distant rating	Claimed Programs			All Matched Programs		
	Model 1	Model 2	Model 3	Model 1	Model 2	Model 3
Local rating	0.008 (9.64)**	0.008 (9.87)**	0.008 (9.64)**	0.006 (8.96)**	0.006 (9.24)**	0.006 (8.96)**
Year (Trend)		-0.000 (1.23)			-0.000 (0.64)	
1999			-			-
2000			-0.000 (0.15)			0.001 (0.75)
2001			-0.001 (0.93)			-0.000 (0.50)
2002			-0.001 (1.38)			-0.000 (0.44)
2003			-0.000 (0.61)			-0.000 (0.10)
Constant	-0.001 (1.49)	0.403 (1.23)	0.000 (0.33)	0.000 (0.00)	0.218 (0.64)	0.000 (0.06)
R^2	0.63	0.64	0.64	0.45	0.46	0.47
N	60	60	60	104	104	104

Note: * $p < 0.05$; ** $p < 0.01$. t-statistics are presented in parentheses.

Exhibit 5. Royalty Distribution for SDC Claimants

Year	SDC Cable share (%)	SDC Satellite share (%)
2010	77.1	75.3
2011	82.6	88.3
2012	84.8	90.7
2013	89.1	97.7

Note: Values subject to rounding.

Exhibit 6. Descriptive Statistics - Coverage ^[1]

MGC Programs	Royalty Share				RODP coverage ^[2]	Total stations ^[3]	% of stations w/ significant viewership ^[4]
	2010	2011	2012	2013			
JACK VAN IMPE PRESENTS	7.9%	11.3%	9.9%	8.6%	100.0%	72-121	11-26%
KENNETH COPELAND DAILY	1.4%	2.1%	2.0%	1.9%	28.8%	20-38	0-10%
CREFLO A. DOLLAR, JR.	7.1%	2.4%	2.9%	0.2%	100.0%	5-15	33-80%
JAMES ROBISON-LIFE TODAY	1.0%	0.4%	0.1%	0.1%	100.0%	9-35	0-10%
KENNETH COPELAND	5.4%	1.2%	0.3%	0.1%	100.0%	3-85	0-50%
BENNY HINNS THS-DAY DAILY	0.2%	0.0%	0.0%	0.0%	59.6%	3-4	0%
SDC Programs							
JOEL OSTEEN	29.7%	38.9%	36.6%	55.5%	76.9%	38-48	85-95%
IN TOUCH 60	20.3%	20.4%	26.8%	20.7%	100.0%	123-161	23-39%
700 CLUB	11.5%	12.6%	14.8%	10.7%	100.0%	64-84	17-33%
IN TOUCH 30	0.4%	0.0%	1.0%	1.2%	36.5%	4-32	13-67%
ENJOYING EVERYDAY LIFE	1.9%	0.7%	0.5%	0.4%	50.0%	12-29	0-12%
KEY OF DAVID	0.8%	1.1%	0.2%	0.2%	96.2%	14-30	3-14%
RELIGIOUS TOWN HALL	0.1%	0.2%	0.1%	0.1%	100.0%	7-13	0-13%
DR. D. JAMES KENNEDY	2.5%	2.7%	0.2%	0.1%	100.0%	3-46	0-25%
AMAZING FACTS	0.8%	1.3%	1.3%	0.0%	36.5%	4-5	20-60%
DAY OF DISCOVERY	0.5%	0.6%	0.0%	0.0%	100.0%	31-42	3-22%
EVER INCREASING FAITH	0.3%	0.0%	0.0%	0.0%	76.9%	5-6	17-20%
IT IS WRITTEN	1.4%	1.7%	1.2%	0.0%	88.5%	6-9	11-50%
J HAGEE'S CORNERSTONE HR	5.3%	2.6%	2.1%	0.0%	94.2%	18-35	9-45%
JOHN HAGEE TODAY	0.0%	0.1%	0.1%	0.0%	90.4%	2-7	0%
ROBERT SCHULLER	1.5%	0.0%	0.0%	0.0%	3.8%	7-14	57-64%

[1] Table sorted by 2013 share for SDC and MGC separately.

[2] Percentage of RODPs a program is ranked among the 52 RODPs over 1999-2013.

[3] Count of stations that broadcast the program in a given year and sweep month. Range is calculated over 2010-2013.

[4] Percentage of stations with at least five thousand viewers in a given year and sweep month. Range is calculated over 2010-2013.

Exhibit 7. Royalty Distribution for SDC Claimants Based on Supplemental Nielsen Impression Data

Year	SDC share (%)
2010	76.7
2011	81.9
2012	87.4
2013	87.8

Note: Values subject to rounding.

Exhibit 8. Royalty Distribution for SDC Claimants Based on Supplemental Nielsen Rating Data

Year	SDC Cable	SDC Satellite
2010	87.0	89.9
2011	86.6	90.7
2012	94.3	98.2
2013	92.8	99.1

Note: Values subject to rounding.

Exhibit 9. Regression Analysis Results – Predicting Distant Viewership

Dependent variable: HHVH	Model 1	Model 2	Model 3	Model 4
Local rating	373,611 (4.17)**	419,853 (6.05)**	426,459 (6.28)**	419,853 (6.05)**
Distant subscribers		0.001 (6.17)**	0.001 (6.37)**	0.001 (6.17)**
Year (Trend)			-14,823 (1.15)	
2000				-33,775 (0.62)
2001				-76,097 (1.42)
2002				-67,424 (1.18)
2003				-52,626 (0.87)
Constant	71,803 (1.60)	-33,074 (0.86)	29,622,969 (1.14)	14,086 (0.25)
R^2	0.24	0.56	0.57	0.58
N	60	60	60	60

Note: * $p < 0.05$; ** $p < 0.01$. t-statistics are presented in parentheses.

Exhibit 10. Royalty Distribution for SDC Claimants Based on Prediction

Model

Year	SDC Cable share (%)
2010	83.3
2011	84.8
2012	84.7
2013	92.5

Note: Values subject to rounding.

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In the Matter of)	
)	
DISTRIBUTION OF 2010-2013)	DOCKET NO. 14-CRB-0010-CD
CABLE ROYALTY FUNDS)	(DISTRIBUTION PHASE)
)	
DISTRIBUTION OF 2010-2013)	DOCKET NO. 14-CRB-0011-SD
SATELLITE ROYALTY FUNDS)	(DISTRIBUTION PHASE)
<hr/>)	

Designated Testimony of Toby Berlin

Written Direct Statement of the SDC (Distribution Phase)

Before the
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Washington, D.C.

In the Matter of

Phase II Distribution of the 1999, 2000, 2001,
2002, 2003, 2004, 2005, 2006, 2007, 2008
and 2009 Satellite Royalty Funds

Docket Nos. 2012-7 CRB SD 2000-2009;
2008-5 CRB SD 1999-2000 (Phase II)

In the Matter of

Phase II Distribution of the 2004, 2005, 2006,
2007, 2008 and 2009 Cable Royalty Funds

Docket Nos. 2012-6 CRB CD 2004-2009
(Phase II)

Testimony of Toby Berlin

Testimony of Toby Berlin

My name is Toby Berlin and I am testifying on behalf of the Settling Devotional Claimants ("SDC") in these proceedings.¹ I have been requested to provide testimony on the procedures employed by satellite and cable television companies to make programming decisions in the 1999-2009 time frame.

I. Professional Background: Work and Education History

I am the President and Founder of School of Toby, Inc., a media consulting business, which was founded in 2013. I provide consulting expertise in the cable, satellite, multichannel video programming distributor ("MVPD"), over-the-top ("OTT") industries.² My services include high level negotiations, strategic planning, business development, financial and contractual support. I advise media companies on organizational structure, packaging, pricing, cost reduction, revenue growth, subscriber acquisition and retention, contract database, compliance, contract negotiations and strategies and crisis management. My clients include

¹ The Settling Devotional Claimants are comprised of the following entities: Amazing Facts, Inc., American Religious Town Hall, Inc., Catholic Communications Corporation, Christian Television Network, Inc., The Christian Broadcasting Network, Inc., Coral Ridge Ministries Media, Inc., Cottonwood Christian Center, Crenshaw Christian Center, Crystal Cathedral Ministries, Inc., Evangelical Lutheran Church In America, Faith For Today, Inc., Family Worship Center Church, Inc. (D/B/A Jimmy Swaggart Ministries), International Fellowship of Christians & Jews, Inc., In Touch Ministries, Inc., It Is Written, John Hagee Ministries, Inc. (aka Global Evangelism Television), Joyce Meyer Ministries, Inc. (FIK/A Life In The Word, Inc.), Kerry Shook Ministries (aka Fellowship of the Woodlands), Lakewood Church (aka Joel Osteen Ministries), Liberty Broadcasting Network, Inc., Messianic Vision, Inc., New Psalmist Baptist Church, Oral Roberts Evangelistic Association, Inc., RBC Ministries, Reginald B. Cherry Ministries, Rhema Bible Church (aka Kenneth Hagin Ministries), Ron Phillips Ministries, Speak The Word Church International, St. Ann's Media, The Potter's House Of Dallas, Inc. (d/b/a T.D. Jakes Ministries), Word of God Fellowship, Inc., d/b/a Daystar Television Network, Billy Graham Evangelistic Association, and Zola Levitt Ministries.

² MVPD generally refers to cable and satellite television companies. OTT refers to television viewers who bypass traditional over-the air, cable, and satellite-delivered programming by using the Internet.

multiple research firms that educate large institutional investors about the media industry. In addition, I am a consultant to the Sony team that's creating a digital MVPD for the PlayStation.

Prior to starting School of Toby, I was a Vice President of Programming Acquisitions at DIRECTV. I was a member of the executive team that grew the business from 3.5 million subscribers to over 20 million subscribers between 1998 and 2013. I managed sourcing and negotiations for programming acquisitions for the DIRECTV service across numerous categories including all New Networks, Spanish-language and International Programming, Shopping Channels, Adult Programming, Airborne,³ and Music packages. I formerly oversaw Pay-per-View Sports, Events and Retransmission Consents/Must Carry. I graduated from the University of Miami in Coral Gables and hold a law degree from Southwestern University of Law in Los Angeles. My Bio is attached as Exhibit 1.

II. Satellite Television Marketing Strategy

When I started, DIRECTV did not have the ability to carry local broadcast stations. In 1999, the Satellite Home Viewer Improvement Act was passed by Congress and DIRECTV was afforded a statutory right to launch local stations across the U.S. That right has been subsequently extended by Congress through the Satellite Home Viewer Extension and Reauthorization Act in 2004 and by the Satellite Television Extension and Localism Act in 2010. I was the executive in charge of launching all the local stations and had oversight responsibility for those deals through 2007. In total, I launched 143 DMAs (Nielsen's Designated Market Areas) consisting of approximately 2,100 local stations.

When satellite operators like DIRECTV and DISH started operations, they competed against entrenched cable company competitors; therefore, to gain subscribers, it was particularly important for the satellite companies to develop program offerings that would be most attractive to gaining potential subscribers and retaining those who became subscribers. Quite simply, more popular programs, as measured by viewing patterns, were more valuable and those with smaller audiences were less valuable. In this regard, DIRECTV carefully analyzed the ratings of cable program because we wanted to be sure that we offered programs that were competitive with the most popular offerings on cable systems, as measured by Nielsen audience ratings.

³ The Airborne service allowed viewers to watch DIRECTV programming on the following airlines: Continental/United, Jet Blue and Frontier.

In order to compete effectively against cable, one of the successful marketing tactics we deployed was to target “niche” demographics. Among the “niches” were sports, women, religion, foreign language and children. We knew our superior sports products attracted men, and we had a great line-up of networks to attract women (e.g, Food, HGTV, Lifetime, WE, audio music). Each of these networks carried specific programs that achieved strong ratings. We realized early on that religion was a very strong niche and decided to aggregate religious programming to satisfy that niche based upon programs that would likely be the most popular in the context of the socioeconomic characteristics of a particular DMA.

I would add that this approach was no different from the tactic developed by cable operators over the same time period. Both industries, satellite and cable, recognize the importance of niche audiences for content, and plan to deliver such programming packages so that they can attract and retain paying subscribers.

III. Serving DMAs and Channel Selection

I will now describe DIRECTV’s process for commencing service in new DMAs, how stations were selected for carriage and the decision process to determine if we would carry the stations’ signal out of market. Because we had to follow a “carry one, carry all” local stations rule, and because there were business limitations preventing us from launching all DMAs, we had to choose channels carefully to ensure that they carried programming that would be popular and attract subscribers.

A. Local-Into-Local Service

Upon receiving the right to launch local stations, DIRECTV appointed a “local-into-local” marketing team. Among its duties was to choose the DMAs and the order in which they would be launched. For each DMA, the team’s research took into account the number of DIRECTV subscribers, the competition (cable only at that time) and its penetration, the topography (because satellite did better in flat, rural areas), the number of multi-dwelling units and cable’s penetration in those units. At the time, we sold mostly at retail outlets, so we also looked for DMAs with a strong DIRECTV retail presence. Finally, at that time, we did not own many of the companies that did our installation, so we tended to focus on DMAs where we owned the installation companies and customer service call centers.

From a satellite transmission perspective, instead of using a national signal to distribute local stations throughout the entire U.S. (which would have been a waste of bandwidth,) DIRECTV developed a spot beam technology that enabled it to have smaller satellite beams throughout the U.S. This technology allowed DIRECTV to tailor channel and program offerings from DMA to DMA. This became an important reason why DIRECTV carried quite a few stations out of market.

I must emphasize how important it was to obtain the right to carry local channels. The feeling among DIRECTV management was that we would be unable to meaningfully compete against cable if we could not carry local content. At the time, DIRECTV subscribers wanting to see local channels were either using a lifeline cable service⁴ or an over the air antenna. Neither of these options was a good or easy solution for the subscriber, and both placed DIRECTV at a severe marketing disadvantage.

B. Factors Driving Subscribers to DIRECTV

There were several significant factors reasons that drove customers to become DIRECTV subscribers. The first was NFL Sunday Ticket. The second was to ability of West Coast subscribers' to receive East Coast signals. Access to East Coast signals was the first time a West Coast subscriber had the ability to time shift a network. The third involved subscribers that were "unserved" by a local station. These subscribers could elect to receive a "distant network signal" of a broadcast network as an alternative. Access to network channels in unserved areas was a big plus for DIRECTV, as well as other satellite service providers.

When DIRECTV launched in 1994, it was expensive to become a DIRECTV subscriber. It could cost \$1,000 just to set up service. By comparison, cable set up fees were relatively cheap. However, once DIRECTV was authorized to distribute local channels, DIRECTV was able to drop costly installation fees, thereby making the company a formidable competitor to cable. While at the beginning of DIRECTV in 1994, our subscribers tended to be more affluent, once we were able to stop charging for installation and were able to offer local channels, our subscriber base became more diverse and, over time, more closely paralleled cable.

⁴ A "lifeline" cable service is the lowest tier in a cable system's pricing package, and typically consists only of local stations available over-the-air.

The process for launching local channels in a DMA was mandated by the FCC. It began with an affirmative notice to stations in each DMA, at which point a station could either elect “must carry” or “retransmission consent.” “Must carry” means exactly what it says – DIRECTV was obligated to carry that station as long as it delivered a quality signal to our head-end. “Retransmission consent” meant that DIRECTV had to enter into a negotiation to pay that station license fees in order to carry it.

Up until that time, except for people receiving signals via home antennas (i.e. over the air), only cable subscribers could receive local stations. And the cable system operators never paid for carriage. In fact, stations willingly offered their stations’ signals for free so they could have enough “eyeballs” to sell advertising. All of this changed when DIRECTV and Dish decided to launch local channels. Because we had to initiate service in so many markets in a short period of time, it was decided that we would pay a nominal fee to each station for the right to carry their signal. The way stations were paid was an amount per subscriber per month. So, if a station is being paid \$0.25, it means \$0.25 per subscriber per month.

C. Competing with Cable

Once we determined what stations we would carry in each market, we performed another study. Since we were utilizing spot beam technology, the marketing group would perform a study showing the station line-up in each DMA that was launched and covered by the same spot beam satellite against a cable line-up in the same DMA. For example, Los Angeles and San Diego were covered by the same satellite. If there was a station in Los Angeles that we wanted to carry in San Diego, either because cable was carrying it and we wanted to compete, or because cable was not carrying it and we thought it would bolster our line-up and attractiveness to subscribers, we would then carry it and pay out of market royalty fees (compulsory royalty fees). In other words, we wanted our line-up to at least match our cable competitors, or be better than our cable competitor.

D. Importance of Program Ratings

In deciding whether or not to carry that station on an out of market basis, we would look at ratings, just like our cable competitors. Our marketing and business analytics departments would supply a list of stations in a DMA with their Nielsen ratings. If a station had high ratings, and cable had it or we believed it would bolster our line-up because it had high ratings, we would

carry the station out of market and pay copyright royalties. Ratings were the single most significant factor that the business team considered when evaluating new programming acquisition opportunities. The Nielsen ratings and other audience measurement tools play a pivotal role in determining the true value of a signal and its constituent programs. This is consistent with the very simple paradigm that satellite operators value programs that people watch and do not value programs that people do not watch. Based on my years of experience in the subscription television industry, I would say other satellite service providers and cable operators all viewed ratings as principal measure of value within a defined genre of programming.

One reason ratings are crucial is because it is difficult to discontinue a channel after a commitment has been made to include it. Once a decision was made to carry a station out of market, DIRECTV rarely, if ever, pulled it from the DMA, unless that DMA became “served,” or if that network’s station launched in the DMA. The reason we never pulled a station once launched is that every station had some loyal constituency, usually a niche audience. However small it might be, we never wanted to have subscribers retaliate by “churning” off the platform, or discontinuing service. So, it was a common practice of DIRECTV that once a station’s carriage commenced, the signal rarely went dark, or was pulled off the air.⁵

As one of the top Programming Acquisitions executives at DIRECTV and the person in charge of launching the local programming, I was the executive responsible for the local carriage decisions. My goal was to have the most popular programming and to make our subscribers happy so they would stay for a long time. In addition, I wanted a strong line-up to market to potential new subscribers whether they were already cable subscribers or simply using an over-the-air antenna to get their favorite stations.

III. Religious Programming

DIRECTV always understood that religious viewers were an important niche that needed to be courted and secured. In the late 1990s, DIRECTV targeted the devotional programming

⁵ The practice was challenged in 2012, when DIRECTV was forced to pull down all of the Viacom networks in a bitter dispute over programming fees. Consistent with my earlier comments, a fee increase initially demanded by Viacom was not justified by the ratings for its channels and programs. DIRECTV was willing to “go dark” on Viacom programming until the fees were reduced.

audience with several specific pay-per-view program (“PPV”) offerings. At the time, DIRECTV shared a satellite orbital slot with a company called USSB. USSB had exclusive rights to HBO, Showtime and MTV. DIRECTV had everything else. This created a disparity in DIRECTV’s PPV revenues, because USSB was afforded the exclusive rights to all of the PPV boxing matches (solely distributed by HBO and Showtime). Because of this, DIRECTV experimented with alternative PPV products that it might not normally seem a typical PPV show. Prime example of the targeted, niche PPV offering were the Easter and Christmas pageants from the Crystal Cathedral. Crystal Cathedral, whose Hour of Power program has a loyal following, staged extravagant pageants during the most important religious seasons. The programs had respectable “buys,”⁶ which let us know that our subscribers enjoyed this type of programs. The Crystal Cathedral programs were an important bridge to a valuable niche audience that helped DIRECTV grow and sustain growth during a very formative period.

Launching local channels also allowed DIRECTV to distribute a large quantity of religious programming that it did not have access to prior to launching local channels. Carriage of broadcast channels, particularly those that telecast large amounts of religious programming, was met with enthusiasm from our subscriber base. Our positive experience with religious programs also encouraged DIRECTV to produce its own specialty devotional programs, such as church services from the University of Notre Dame⁷ as well as a televised series entitled “Songs of Praise”. The latter show featured well-known performers singing popular religious songs and featured choirs from around the country, including from the Crystal Cathedral, Brooklyn Tabernacle, St. Olaf, and Coral Ridge, among others. One of these specials even garnered over 2 million viewers and strengthened DIRECTV’s position as a proud supporter of family-friendly programming.

⁶ The “buy” rate for a pay-per-view program serves a similar function to Nielsen ratings because it quantifies the popularity of a program.

⁷ I also helped DIRECTV launch a special platform called “Public Interest Obligations” or PIO channels. The FCC mandated that DIRECTV take 4% of its capacity (about 10 channels) for non-commercial channels. Many religious channels applied for the PIO channel spots. I was able to negotiate carriage deals with some of them, thereby continuing to serve our important religious subscriber niche.

IV. Other Niche Areas

A. Spanish Language Subscribers

Another area over which I had oversight was DIRECTV's Spanish language platform, formerly known as Para Todos and now known as DIRECTV Mas. Our satellite competitor had launched a Spanish language platform, and we knew it was very popular. We thought we could improve upon the Spanish line-up and in 2000 we launched our version of a Spanish platform. Unfortunately, our competitor had the largest Mexican network on an exclusive basis, but I was able to "own" the Puerto Rican, Cuban and Dominican markets by virtue of exclusive deals with networks from those countries. According to research, we understood that the Hispanic market was an active consumer of religious programming, particularly religious programming from their home country. To that end, I handled distribution deals for the following Spanish language religious networks: EWTN Red Global Catolica, Enlace Christian TV and Almavision..

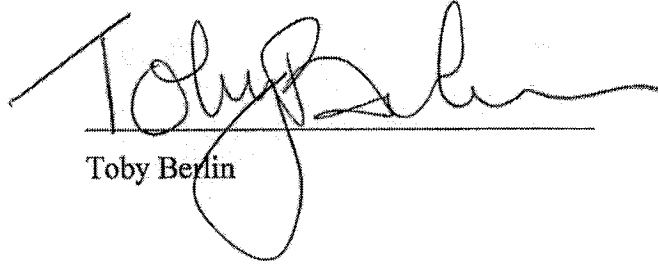
B. Children Programming

Another area that I had oversaw was children's programming. As children's viewership habits largely depended on parental involvement, we knew that children's programming was a big driver for new subscribers, as well as a great marketing tool to introduce new programming packages. Some of the more popular children's programming was originated by PBS and Discovery. I also launched some of the "new" entrants to the children's programming market – PBS Kids, Baby First TV (English and Spanish), Vme (a Spanish language network geared towards children), Discovery Familia (Spanish network geared towards families). These eventually became widely distributed by other pay TV operators as well.

DECLARATION OF TOBY BERLIN

I declare under penalty of perjury that the foregoing testimony is true and correct and of my personal knowledge.

Dated: May 9, 2014



Toby Berlin

EXHIBIT 1

Toby Berlin Bio

In her current role, Toby Berlin provides consulting expertise in the Cable/Satellite/MVPD universe including, high level negotiations, strategic planning, business development, financial and contractual support. She also advises on organizational structure, packaging, pricing, cost reduction, revenue growth, subscriber acquisition and retention, contract database, compliance, contractual negotiations and strategies and crisis management. She serves as the Cable/Satellite/Retransmission Consent Advisor for multiple research firms to educate large institutional investors on industry. In addition, Berlin is a consultant to the SONY team that's developing a digital general network distribution product for the Playstation and advises on essential successful media distribution strategies and sales, marketing and operations best practices. She has created the roadmap for news-based cable network for expansion into airlines, hotels, motels and office buildings as well as crafted a successful negotiation strategy for cable networks seeking to extend contractual relationship with distributors.

In her previous role, Berlin was responsible for aspects of programming acquisitions for the DIRECTV service including all networks available on DIRECTV's Spanish-language package DIRECTV en Español, DIRECTV's WorldDirect international programming packages, shopping channels, adult programming, DIRECTV's airborne platforms on Continental, JetBlue and Frontier airlines, as well as the Sonic Tap music channels available on the DIRECTV platform.

As a contract specialist, Berlin contributed millions of dollars to the bottom line from programmers' contractual non-compliance.

After the passing of the Satellite Home Viewer Improvement Act of 1999 (SHVIA), which gave DIRECTV the rights to broadcast local channels across the United States, she led the efforts to bring these channels to homes across the country. Berlin negotiated the local into local rights for DIRECTV, and successfully launched the broadcast of local channels in over 143 DMAs since January 2000.

In 2006, she conceived, developed and directed the execution team for DIRECTV's Titanium package. This upscale service gives VIP subscribers access to every channel and every Pay Per View event and movie broadcast on the DIRECTV service for a single yearly fee, and debuted to a chorus of positive publicity singling out the platform's uniqueness and exclusivity.

Berlin was also the president emeritus and founder of the Women's Leadership Exchange at DIRECTV. This internal group enhanced the experiences of female employees at DIRECTV through monthly seminars with industry executives, networking sessions, Toastmasters club, a mentoring program, a working mothers group, and quarterly newsletters. The WLE currently operates in Los Angeles, Denver and New York.

Berlin is equally adept at handling Sponsorship deals. As founding organizing committee member for DIRECTV's annual Beach Bowl and VIP "After Party" aligned with Super Bowl she negotiated network and product sponsorships, celebrity, athlete and entertainer participation. 2013 performers included Mark Cuban and Justin Timberlake. The event had been held for six years and is televised throughout U.S. and is one of the most anticipated events of the Super Bowl weekend.

Prior to her work at DIRECTV, she served as executive director of The Learning Annex, where she was responsible for the creation of a monthly catalog of over 250 classes featuring top best-selling authors and personalities.

Berlin holds a bachelor's degree from the University of Miami in Coral Gables, Fla. and a law degree from Southwestern University of Law in Los Angeles. Berlin lives with her family in Santa Monica, Calif., where she is active in the community and in 2010, served as a board member for the Santa Monica Pier.

1

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Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

IN THE MATTER OF: :
: Docket No.
: 2012-6 CRB CD 2004-
Distribution of the 2004- : 2009 (PHASE II)
2009 Cable Royalty Funds :
:
:
IN THE MATTER OF: :
: Docket No.
Distribution of the 1999- : 2012-7 CRB SD 1999-
2009 Satellite Royalty : 2009 (PHASE II)
Funds :
:
:

VOLUME II

Tuesday,
April 14, 2015
Room LM-408
Madison Building
Library of Congress
101 Independence Avenue, S.W.
Washington, D.C.

The above-entitled matter came on for
hearing, pursuant to notice, at 9:10 a.m.

BEFORE:

THE HONORABLE SUZANNE M. BARNETT,
Copyright Royalty Judge
THE HONORABLE JESSE FEDER,
Copyright Royalty Judge

THE HONORABLE DAVID R. STRICKLER,
Copyright Royalty Judge

On Behalf of the Motion Picture
Association of America:

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4

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TABLE OF CONTENTS

WITNESS:	DIRECT	CROSS	REDIRECT	RECROSS
----------	--------	-------	----------	---------

John Sanders				
By Mr. Boydston		8		
Toby Berlin				
By Mr. MacLean	60		137	
By Mr. Boydston		90		
Raul Galaz				
By Mr. Boydston	147			
By Mr. MacLean		257		
By Mr. Olaniran		277		

Voir Dire on pages 216 and 217

Exhibits:	Mark Recd
SDC	
633 Berlin Written Testimony	
634 Berlin Written Testimony	
642 Galaz Written Testimony	
IPG	
124 Mr. Galaz's report on Claimants, Claims and Years of Representation	147 149
125 Report on Programs Claimed	150 151
141 Report on Stations Distantly Retransmitted by DirecTV from 1999 to 2009	152 154
142 Attrition Rates - DirecTV Data	158 160
143 Royalties and Growth	164 168
144 Report of Receipts - Distant Royalties, May 2014	165 166

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Written Direct Statement of the SDC (Distribution Phase) - Designated Testimony of Toby Berlin

57

1 THE WITNESS: No, I have not.

2 JUDGE FEDER: Do you have any

3 particular knowledge of how a cable operator

4 values a local station, when determining how much

5 to pay for retransmission consent?

6 THE WITNESS: Yes.

7 JUDGE FEDER: And how is that done?

8 THE WITNESS: I would answer that in

9 two phases. Number one, I think it was

10 manifested in the example that I gave you

11 initially about Nexstar, in that looking at

12 certain portions of a broadcast day that drove

13 viewers and subscribers, and what that means for

14 the system.

15 I'd also mention that this

16 retransmission that's getting paid for the over-

17 the-air broadcasting and then particularly for

18 the most desirable programs, it would become a

19 huge thing in the television industry. A lot of

20 the larger multi-station operators entered into

21 sort of blanket agreements with cable systems, so

22 that for example, I'll just another company as an

58

1 example.

2 There's another similar company called

3 Sinclair Broadcasting that owns television

4 stations. If they buy one in a certain market,

5 it might be -- and say Comcast is the provider

6 there, the retransmission will be based on some

7 kind of a global agreement that they have arrived

8 at, to some extent to make it easier so that they

9 don't have to, every single time they buy a

10 station, enter into a whole new negotiation.

11 But those rates have been set, you

12 know, based on the tug and pull of the

13 marketplace, based upon the programming that

14 those companies provide across markets. The

15 recurrent theme, and you'll see if you look at

16 the literature that any of these companies

17 produce is localism, that they try and produce

18 programming that's very difficult to duplicate,

19 and expensive to duplicate, and as a consequence

20 has a higher level of desirability.

21 So the retransmission revenues have

22 been going up, you know, at a very high -- it

59

1 started off at 15 cents per subscriber and now

2 it's been going up to 50 cents and 75 cents and

3 now over a dollar.

4 So again, it's a big thing, and it's

5 been on the upward trend. Most of the agreements

6 have escalations built into them, which again is

7 largely a function, in my opinion, of the iron

8 fist of the marketplace, that the specific

9 programming, the most important programming that

10 these television stations offer is indispensable

11 for the pay television operators and the

12 satellite cable sectors.

13 JUDGE FEDER: Okay. So if I'm

14 understanding, generally it's not -- these things

15 aren't negotiated one cable operator to one

16 station. It's much broader than that?

17 THE WITNESS: That's the way it has

18 evolved over the years. It was probably much

19 less so over the time period that we're looking

20 at here.

21 I mean I think it's really taken off

22 kind of in the last four to five years. So like

60

1 a lot of industries or segments of an industry

2 that's in its infancy, I think there was a lot

3 more negotiating at the local basis the

4 retransmission phenomenon was going through its

5 infancy.

6 JUDGE FEDER: Okay. Thank you very

7 much.

8 JUDGE BARNETT: Any follow-up?

9 VOICES: Nothing.

10 JUDGE BARNETT: Okay. Thank you Mr.

11 Sanders. You may step down.

12 MR. MACLEAN: Your Honor, the SDC

13 calls Toby Berlin.

14 Whereupon,

15 TOBY BERLIN

16 was called as a witness and, after having been

17 first duly sworn, was examined and testified as

18 follows:

19 JUDGE BARNETT: Please be seated.

20 DIRECT EXAMINATION

21 BY MR. MACLEAN:

22 Q Good morning, Ms. Berlin.

61

1 A Hi.

2 Q As you know, I'm Matthew Maclean. I

3 represent the Settling Devotional Claimants.

4 Could you please introduce to your judges,

5 starting with the spelling of your first and last

6 name?

7 A Sure. It's Toby, T-O-B-Y, Berlin, B-

8 E-R-L-I-N. I have an undergraduate degree in

9 Business from the University of Miami, and a law

10 degree from Southwestern University of Law in Los

11 Angeles.

12 I had a stint in a large casino and a

13 stint in a theatrical agency, and now I'm -- from

14 October of '98 through July of 2013, I was at

15 DirecTV, where I was a vice president of

16 Programming Acquisitions. My responsibilities

17 were general entertainment, Spanish,

18 International, Adult, Audio Music, Airborne,

19 which were airlines.

20 When DirecTV got the right to do local

21 to local, I handled all of those deals, which was

22 about 143 DMAs. I also started their pay-per-

62

1 view business, and finally I was the founder and

2 president of the Women's Group called the Women's

3 Leadership Exchange. In all of those areas, I

4 did the content acquisition deals.

5 Since July 2013, I have my own

6 consulting business called School of Toby, and I

7 do pretty much the same thing. Content

8 acquisition deals for various distributors. I

9 also advise hedge funds that are interested in

10 investing in the cable, satellite, telco over the

11 top arena.

12 In addition, I'm the content

13 acquisition and strategy consultant for Sony

14 Playstation on their Vue product, which is an app

15 on the Playstation, which is about 120 live

16 networks through the Playstation Vue, all

17 delivered over the top.

18 Q Have you ever testified as an expert

19 witness before?

20 A No.

21 JUDGE FEDER: Excuse me. Just one

22 question. What is over the top?

63

1 THE WITNESS: Sorry. Via the

2 Internet. It's kind of acronyms that we use to

3 confuse everybody.

4 JUDGE FEDER: Confused me.

5 (Laughter.)

6 BY MR. MACLEAN:

7 Q So now your experience with respect to

8 programming was primarily developed at DirecTV,

9 is that right?

10 A That's correct.

11 Q A satellite system operator?

12 A Correct. We were a satellite

13 distributor of live networks.

14 Q Are you also familiar with the

15 programming decisions made by cable system

16 operators?

17 A I am.

18 Q And in what way have you become

19 familiar with cable system operators essentially?

20 A Well, it's a very similar business.

21 We all try to acquire subscribers and keep

22 subscribers.

64

1 In addition, I've always made it a

2 point to be really good friends with my folks

3 that do the same thing that I do. So I'm well

4 aware of the issues that we all face, and through

5 my stint at DirecTV I was -- many head hunters

6 called me to do the same thing for a cable

7 operator.

8 So it really is the same identical

9 business. Getting and keeping subscribers, and

10 the programming deals do not differ at all.

11 Q Would you regard cable system

12 operators as among the competitors of DirecTV?

13 A Yes, exactly.

14 Q Are your background and your

15 qualifications more fully set forth in the

16 written testimony we submitted?

17 A Yes.

18 MR. MACLEAN: Your Honor, I offer Ms.

19 Berlin as an expert in satellite and cable

20 television programming.

21 MR. BOYDSTON: Your Honor, may I voir

22 dire?

65

1 JUDGE BARNETT: You may.
2 VOIR DIRE
3 BY MR. BOYDSTON:
4 Q Thank you, Your Honor. Good morning,
5 Ms. Berlin. My name is Brian Boydston,
6 representing the Independent Producers Group.
7 When did you first speak with a representative
8 from the SDC?
9 MR. MACLEAN: Objection, Your Honor.
10 That has nothing to do with --
11 JUDGE BARNETT: That has nothing to do
12 with her expertise.
13 MR. BOYDSTON: May I make an offer of
14 proof, Your Honor, or an explanation?
15 JUDGE BARNETT: Yes.
16 MR. BOYDSTON: Ms. Berlin spoke with
17 IPG before -- we believe before she spoke with
18 the SDC. IPG provided her attorney with various
19 proprietary and confidential information, and
20 then several weeks later, it was made known to us
21 that she was retained by the SDC, and we wish to
22 find out the details of that, but we don't know.

66

1 But we want to know whether or not
2 certain information was passed on without our
3 knowledge.
4 MR. MACLEAN: Your Honor, whether or
5 not, that would be permissible for cross-
6 examination. It certainly is not permissible for
7 voir dire. It has nothing to do with her
8 qualifications as an expert.
9 MR. BOYDSTON: I couched this voir
10 dire, Your Honor, only because I believe that if
11 the facts came out a certain way, there could be
12 grounds to strike her testimony. That's why I
13 couched this voir dire.
14 JUDGE BARNETT: Okay, all right. It's
15 not voir dire, so have a seat Mr. Boydston.
16 JUDGE STRICKLER: I have a question.
17 Is this part of the written objections that
18 you've made, that we need to rule upon?
19 MR. BOYDSTON: To a degree, except we
20 are -- yes, but we are operating in a vacuum of
21 information, which I seek to close up with a few
22 questions when I have the opportunity.

67

1 JUDGE STRICKLER: So you've moved or
2 applied to strike her testimony, but you're
3 saying --
4 MR. BOYDSTON: I beg your pardon, Your
5 Honor. We did not. We did not in a written --
6 that was not one of our written objections filed
7 ahead of time, to answer your question.
8 JUDGE STRICKLER: So we won't see it
9 in any papers that we have now. This is speaking
10 objection that you may have --
11 MR. BOYDSTON: That's correct.
12 JUDGE STRICKLER: --depending upon
13 what you develop in cross-examination?
14 MR. BOYDSTON: Exactly.
15 (Pause.)
16 JUDGE BARNETT: We're going to consult
17 for a couple of minutes.
18 (Whereupon, the above-entitled matter
19 went off the record at 10:15 a.m. and resumed at
20 10:27 a.m.)
21 JUDGE BARNETT: Please be seated.
22 Counsel, we're going to treat this speaking

68

1 motion the same as we are treating all of the
2 other motions that are pending. So Mr. Boydston,
3 to the extent you want to develop anything on
4 cross-examination you may.
5 Just so you're aware of our thinking,
6 what I think is is that responses to all of the
7 pending written motions that would otherwise have
8 been due today or tomorrow should be filed with
9 your proposed findings and conclusions, or
10 simultaneously with your proposed findings and
11 conclusions, and replies to those motions should
12 be filed simultaneously with your reply findings
13 and conclusions, and then we'll have the whole
14 record to work with.
15 MR. MACLEAN: Your Honor, with respect
16 to the subject, IPG has submitted no objection to
17 the testimony of Ms. Berlin. Objections were due
18 last Tuesday. They didn't file any written
19 objection or motion, with respect to Ms. Berlin's
20 testimony.
21 JUDGE BARNETT: That is true. I
22 understand that. So that will be part of your

69

1 response no doubt.
 2 MR. MACLEAN: Yes, Your Honor.
 3 DIRECT EXAMINATION (resumed)
 4 BY MR. MACLEAN:
 5 Q With respect to your written
 6 testimony, have you spoken with Mr. Galaz?
 7 A I did.
 8 Q How many times?
 9 A Once.
 10 Q Can you explain the circumstances?
 11 A He was introduced to me by a former
 12 DirectTV attorney, who hadn't -- I don't -- I just
 13 have a friendly relationship. I don't work with
 14 him. He's not under my employ, and we were
 15 introduced via email and he called me once.
 16 Q By the time -- by that time when he
 17 called you, had you begun speaking with Mr.
 18 Lutzker on behalf of the SDC?
 19 A Yes, I had already spoken to Mr.
 20 Lutzker.
 21 Q Had you been engaged as an expert for
 22 the SDC at that time?

70

1 A We were discussing, but I hadn't been
 2 engaged.
 3 Q Were you ever engaged as an expert
 4 witness or expert consultant for IPG?
 5 A No, I was not engaged by them.
 6 Q After that initial phone call with Mr.
 7 Galaz, did you ever speak with Mr. Galaz again?
 8 A I did not.
 9 Q Did you agree on that phone call to
 10 serve as an expert?
 11 A No, I did not agree to do anything.
 12 I didn't ask him to send me any documents. I
 13 mostly listened. Quite honestly, I didn't
 14 understand it or didn't think it was the same
 15 case for quite some time, and then I -- but there
 16 was no meeting of the minds in any aspect.
 17 JUDGE STRICKLER: You say you didn't
 18 ask him to send you any documents?
 19 THE WITNESS: I did not.
 20 JUDGE STRICKLER: Thank you. Did he
 21 in fact send you any documents?
 22 THE WITNESS: He sent me one document.

71

1 JUDGE STRICKLER: Did you keep it or
 2 did you send it back to him?
 3 THE WITNESS: I still have it.
 4 JUDGE STRICKLER: How did he send
 5 that?
 6 THE WITNESS: He sent it via email.
 7 Again, I didn't ask for any documents and I -- it
 8 went into sort of the email chain. I don't think
 9 I even looked at it or read it, because I again
 10 didn't ask for it. We weren't engaged. My
 11 friend was copied on it, so I can't see how they
 12 would say it's confidential.
 13 He didn't ask me to treat it as
 14 confidential. I don't have any privilege with
 15 him at all.
 16 JUDGE STRICKLER: Your friend is
 17 referred to -- the attorney that you mentioned
 18 before in your testimony?
 19 THE WITNESS: Yes, exactly.
 20 JUDGE STRICKLER: Do you have a copy
 21 of that email in court, the hearing room today?
 22 I don't want it now. I just want to know if you

72

1 have it.
 2 THE WITNESS: I have my laptop with
 3 me, and it's in there.
 4 JUDGE STRICKLER: So is it available
 5 for us to look at should we choose to?
 6 THE WITNESS: Uh-huh, right.
 7 BY MR. MACLEAN:
 8 Q Subsequent to that conversation with
 9 Mr. Galaz, were you engaged by the SDC?
 10 A Yes, I was.
 11 Q How long after that conversation?
 12 A Maybe a week to ten days.
 13 Q Subsequent to your engagement by the
 14 SDC, were you again contacted by anybody on
 15 behalf of IPG?
 16 A I was.
 17 Q Can you explain the circumstances of
 18 that?
 19 A Dr. Robinson called me about a month
 20 later, and I had never met her, and she made it
 21 sound like she was working for Mr. Lutzker's
 22 firm, and so I immediately got off the phone and

73

1 contacted Mr. Lutzker and said is she on her
 2 team, and I subsequently found out she wasn't,
 3 and sent her a note to say that I wasn't engaged.
 4 JUDGE STRICKLER: Excuse me. When
 5 you say she made it sound like she was with your
 6 team, working with Mr. Lutzker, what as far as
 7 you recall did she say to make you come to that
 8 conclusion?
 9 THE WITNESS: Well, it was about a
 10 month later, from when I had spoken to Mr. Galaz,
 11 and she said I'm from the attorney's office, or
 12 I'm from -- on the case, you know, and I hadn't
 13 spoken to anyone in a month. So but it sounded
 14 like oh, you know, I'm ready to discuss your
 15 testimony with you, something along those lines.
 16 JUDGE STRICKLER: And she didn't
 17 identify which attorney?
 18 THE WITNESS: No.
 19 JUDGE STRICKLER: Thank you.
 20 BY MR. MACLEAN:
 21 Q And after speaking with Mr. Lutzker
 22 about that phone call, did you respond to Dr.

74

1 Robinson?
 2 A Yes, I did.
 3 Q And what was your response?
 4 A That I had a conflict and couldn't
 5 speak with her.
 6 MR. MACLEAN: Let's take a look at
 7 your written testimony. In the binder in front
 8 of you, turn to SDC Exhibit 633.
 9 (Whereupon, the above-referred to
 10 document was marked as SDC Exhibit No. 633 for
 11 identification.)
 12 JUDGE STRICKLER: Before you do that,
 13 after the first conversation you had with Mr.
 14 Galaz when you received the email, and before you
 15 heard from Dr. Robinson, did you ever get back to
 16 Mr. Galaz, I want to make sure I understand this,
 17 and tell him "I'm sorry, I can't work with you
 18 because I have a conflict. I'm working with the
 19 SDC," or you just didn't get back to him at all?
 20 THE WITNESS: I just did not get back
 21 to him.
 22 JUDGE STRICKLER: Thank you. I'm

75

1 sorry, go ahead.
 2 BY MR. MACLEAN:
 3 Q Turn to SDC 633.
 4 A Yes.
 5 Q What is SDC 633?
 6 A It's my testimony.
 7 Q If you could turn to the last page.
 8 A Uh-huh.
 9 Q I'm sorry, the last page before
 10 Exhibit 1, which is at the bottom. Is that your
 11 signature on the last page?
 12 A Yes, it is.
 13 Q Is everything in this testimony true
 14 and correct?
 15 A Yes, it is.
 16 Q Do you have any changes to this
 17 testimony?
 18 A No, I don't.
 19 Q And Your Honor, I'm sorry. I don't
 20 think you've ruled on my offer of Ms. Berlin as
 21 an expert as an expert in satellite and cable
 22 television programming.

76

1 JUDGE BARNETT: You're right. Any
 2 objection?
 3 MR. OLANIRAN: No objection.
 4 MR. BOYDSTON: No objection, Your
 5 Honor.
 6 JUDGE BARNETT: Okay. Ms. Berlin has
 7 been authorized to testify as an expert in --
 8 MR. MACLEAN: Satellite and cable
 9 television programming.
 10 JUDGE BARNETT: Thank you. Satellite
 11 and cable television programming.
 12 MR. MACLEAN: Your Honor, I offer SDC
 13 633 into evidence.
 14 MR. BOYDSTON: Your Honor, no
 15 objections except for the ones we may have,
 16 depending upon the content, as we've discussed.
 17 JUDGE BARNETT: Okay.
 18 MR. OLANIRAN: No objection.
 19 JUDGE BARNETT: 633 is admitted.
 20 (Whereupon, the above-referred to
 21 document was received into evidence as SDC
 22 Exhibit No. 633.)

77

1 MR. MACLEAN: Your Honor, I'll also
2 note for the record that SDC 634, and we
3 submitted her testimony in both the cable and
4 satellite proceedings prior to the consolidation,
5 SDC 634 is identical to SDC 633, and we submitted
6 the same testimony in both so as not to burden
7 the judges of the Copyright Royalty Board. We're
8 not going to offer 634, simply because it's
9 identical to 633.

10 (Whereupon, the above-referred to
11 document was marked as SDC Exhibit No. 634 for
12 identification.)

13 JUDGE BARNETT: Okay. Would you
14 actually withdraw?

15 MR. MACLEAN: We will withdraw SDC
16 634.

17 JUDGE BARNETT: Thank you.

18 (Whereupon, SDC Exhibit No. 634 was
19 withdrawn.)

20 BY MR. MACLEAN:

21 Q All right. Ms. Berlin, I don't want
22 to go through your entire written testimony

79

1 A That's correct.

2 Q Okay. So how do you reconcile these
3 two, these two claims, one that ratings are an
4 important single driver, and the other that
5 quirky, niche or subsets of the market is
6 important?

7 A Sure. So the way that I always looked
8 at it is that, sort of going back to the basics,
9 my job was to get and keep subscribers by virtue
10 of content, and what we found early on at DirecTV
11 is that we reached sort of a maturation or
12 saturation point with certain areas, like general
13 entertainment, and then in order to grow the
14 business, we needed to look at niche markets.

15 There in fact we found very fertile
16 ground, Spanish, international, religious,
17 children and I headed up most of those
18 businesses. Then within those niches, I would
19 look at the Nielsen ratings, to decide which
20 stations I would carry within the out of market
21 DMAs.

22 Q Now why would you do that?

78

1 because we have an agreement amongst the parties
2 and with the judges not to rehash. These matters
3 are already set forth.

4 But just to get to some of the
5 arguments that have been made by IPG, and I'll
6 get right to the heart of it, in your written
7 testimony, you talk about Nielsen ratings being
8 important in the decision-making by cable and
9 satellite operators to carry programming and
10 stations; correct?

11 A Yes, I do.

12 Q You also talk about the importance and
13 your participation in courting these markets,
14 like devotional programming, Spanish language-
15 speaking and other markets of that nature, or you
16 know, subparts of the market; is that right?

17 A Yes.

18 Q Now by definition, programming geared
19 towards a niche market or a small subpart of the
20 market might have lower ratings than programming
21 that is more broadly marketed or more broadly
22 attractive, right?

80

1 A I just felt that Nielsen, you know,
2 I'm not one to reinvent the wheel. It's what we
3 all use to look at the popularity of like -- for
4 like programming stations, and I found that it
5 gave me the best indicator of the popular
6 stations.

7 Q To your knowledge and understanding,
8 is this also the kind of analysis that your
9 competitors would conduct?

10 A Yes.

11 Q Was there some -- why did you consider
12 Nielsen in particular a measure of viewership?

13 A Well, there were a couple of reasons.
14 First of all, everything comes with a cost, and
15 in a big corporation, there's a lot of eyeballs.
16 I was a cost center. So there were eyeballs on
17 every decision that I made that cost the company
18 money.

19 So I needed to have a reason why I
20 would make these decisions, and Nielsen provided
21 me with a really good backbone to make these
22 decisions, and one that was recognized by the

81

1 different groups within DirecTV that had
2 oversight on the spending that I would make.

3 Q Did you consider -- did you consider
4 Nielsen information when deciding whether to
5 retransmit a broadcast station from a distant
6 market?

7 A Yes.

8 Q When you were considering Nielsen's
9 information in that context, would you consider
10 the ratings information from the originating
11 market, or from the market in which you were
12 retransmitting?

13 A I looked at both. I would look at --
14 I found that they were both good indicators. So
15 I would look at the market where the station
16 resided, as well as the outside market.

17 Q Now were there circumstances in which
18 you were looking at acquisition of a distant
19 station, when viewership information in your
20 particular market was not available, maybe
21 because the station wasn't --?

22 A There were.

82

1 Q What would look at in those
2 situations, where you don't have Nielsen
3 information for the particular market in which
4 you are retransmitting?

5 A I would look at the DMA where the
6 station resided.

7 Q And did you find as a general matter
8 that the information that you would get from that
9 DMA would be transportable to making business
10 judgments in the DMA where you're retransmitting?

11 A Yes, exactly.

12 Q Have you ever had a circumstance where
13 you were surprised unpleasantly about the -- or
14 pleasantly, relating to the transportability of
15 the information you were relying on from an
16 originating DMA to the DMA where you were
17 retransmitting?

18 A No. I found the Nielsen very
19 valuable, and I was never surprised in my
20 decision-making.

21 JUDGE STRICKLER: I have a question
22 for you. When you look at religious programming

83

1 as a particular niche, you say you relied on
2 ratings predominantly to decide which ones would
3 be most attractive; is that correct?

4 THE WITNESS: Yes.

5 JUDGE STRICKLER: Did you ever do any
6 sub-niche work so as to distinguish between
7 whether or not you wanted more evangelical
8 religious programming or more Catholic
9 programming? I noticed you mentioned something
10 from the University of Notre Dame in your
11 testimony. Did you ever get that granular within
12 religious programming, or you treated all
13 religious programming as homogenous, for purposes
14 of making your business decision?

15 THE WITNESS: For the religious
16 programming, I treated it pretty homogenous, and
17 I relied on the ratings information to tell me
18 what was most popular in those DMAs or out of
19 market DMAs.

20 JUDGE STRICKLER: Thank you.

21 BY MR. MACLEAN:

22 Q Now the observation was also made I

84

1 think first by you and maybe by Mr. Galaz, that
2 DirecTV would rarely drop a station, that it
3 decided to retransmit. Is that an accurate
4 observation?

5 A Yes, that is.

6 Q And what's the reason for that?

7 A Every station, every channel, every
8 network has a constituency, a very vocal
9 constituency and we pretty much found out the
10 hard way when, I think very early on, there was a
11 very unpopular Japanese network dropped and, you
12 know, we got thousands of emails.

13 So from that moment on, and I think
14 most of them were in calls to my home number, so
15 from that moment on we decided, and we found that
16 there was just every station has a constituency
17 no matter, and they're very vocal.

18 Q How do you reconcile that
19 understanding with your claim that Nielsen
20 ratings are important in a carriage decision?

21 A Well, Nielsen ratings are the
22 measurement that I used, and then we would find

85

1 that the Nielsen ratings were in fact true and
2 the station would have quite a vocal group, and
3 let me just explain what the constituency that
4 was -- liked each station.

5 If my job was to get and keep
6 subscribers. I never wanted to lose a subscriber
7 by dropping a station. We never wanted a
8 subscriber to call the call center, because a
9 call center is basically to acquire sales, and
10 every call costs money.

11 So you never wanted to be the
12 executive that, you know, flooded a call center
13 basically. And then so the Nielsen ratings would
14 tell me what's popular, and I enjoyed getting
15 calls from my subscribers, letting me know that I
16 made a right decision.

17 Q Would the fact that you would
18 generally not drop a station once you were
19 carrying it, did that bear on your decision to
20 use the Nielsen ratings in the first place, in
21 deciding whether to carry --

22 A Exactly.

86

1 Q Why is that?

2 A Because you never wanted to make the
3 wrong decision, and I found that by using the
4 Nielsen ratings, I made the right decisions. It
5 never steered me wrong.

6 Q Now there's been a suggestion made and
7 testimony from IPG that you, and I'll quote you,
8 mistakenly suggest that distant retransmission by
9 SSOs could not occur prior to 1999. Do you have
10 a response to that claim?

11 A So there was prior to '99, and this
12 was before I was at DirecTV, there was an
13 instance where we were or they were able to
14 transmit the Big Four, would transmit as a
15 distant signal. But in my vernacular and what
16 I'm testifying to, is once DirecTV got the right
17 to launch local into local. So that's purely my
18 area of expertise.

19 Q Can you explain to the judges what
20 local into local means?

21 A Sure. It's basically the right to
22 carry a local station in a DMA.

87

1 Q And would those retransmissions be
2 negotiated?

3 A Yes.

4 Q Can you explain how that process would
5 work, the negotiation of local into local
6 retransmission?

7 A Sure. So basically we would decide to
8 go into a DMA. There were a lot of factors that
9 would determine why we would decide on a DMA,
10 population, topography, whether or not we had a
11 good installer or installers, and then we'd go
12 into a DMA.

13 We would need to announce it by
14 sending a letter to every station, and then a
15 station could either elect must-carry or
16 retransmission consent. Must carry meant I
17 needed to carry them; retransmit I had to
18 negotiate.

19 Then once the negotiations started,
20 the way that it works is per subscriber per
21 month. So if I say a dollar, it means I was
22 being charged a dollar per month per subscriber,

88

1 and they were highly negotiated deals.

2 Q And how would that price be
3 negotiated, that dollar versus some other number
4 per subscriber?

5 A There were a number of factors, but it
6 was mostly based on popularity of the station.

7 Q How was popularity of the station
8 typically measured?

9 A Nielsen ratings.

10 Q I just have -- just one more question.
11 Thank you. No further questions.

12 JUDGE BARNETT: Mr. Boydston.

13 MR. BOYDSTON: Thank you.

14 JUDGE BARNETT: You know, Mr.
15 Boydston, because of order of presentation, you
16 seem to always be interrupting your examination.

17 MR. BOYDSTON: All right.

18 JUDGE BARNETT: Why don't we take our
19 morning recess now, and then we won't have to
20 interrupt your questioning.

21 MR. BOYDSTON: Thank you, Your Honor.

22 JUDGE BARNETT: So we'll be at recess

89

1 for 15 minutes.

2 (Whereupon, the above-entitled matter

3 went off the record at 10:43 a.m. and resumed at

4 11:01 a.m.)

5 JUDGE BARNETT: Please be seated. Mr.

6 Boydston, cross-examination.

7 MR. BOYDSTON: Thank you, Your Honor.

8 JUDGE BARNETT: Oh, okay. Judge Feder

9 has a question while you're organizing.

10 MR. BOYDSTON: Okay, thank you.

11 JUDGE FEDER: Ms. Berlin, you

12 testified earlier that, in determining the price

13 point for retransmission consent, you considered

14 Nielson ratings to be given only at the level of

15 the station, the overall ratings for the station,

16 or did you ever look behind that at the ratings

17 for individual shows?

18 THE WITNESS: Well, shows are what

19 sort of drives the ratings for the station. So I

20 would look to see if it was, you know, what was

21 driving that heavy duty rating, what day part,

22 that kind of thing. But usually the station's

90

1 rating told the story of the shows.

2 But I did look underneath, because

3 also I might find something that I could exploit

4 on pay-per-view or a different mechanism within

5 DirecTV. So I was always looking for different

6 ideas, to see for a breakout then.

7 JUDGE FEDER: Thank you.

8 MR. BOYDSTON: Your Honor, may I

9 consult just for a moment with the Clerk about

10 two exhibits just one second?

11 JUDGE BARNETT: You may.

12 CROSS EXAMINATION

13 BY MR. BOYDSTON:

14 Q Good morning, Ms. Berlin. My name is

15 Brian Boydston. I'm the attorney for Independent

16 Producers Group. When did you first -- was Mr.

17 Lutzker the first person you spoke with from the

18 SDC?

19 A Yes.

20 Q And when was that, to the best of your

21 recollection?

22 A It was in mid or late February.

91

1 Q Of this year?

2 A No, of 2014.

3 Q Oh, 2014? Okay, and did they contact

4 you or did you contact them?

5 A They contacted me.

6 Q And did they say how they had found

7 your name or your information?

8 A Yes.

9 Q And what did they say?

10 A And actually let me go back. There

11 was a consultant that Mr. Lutzker used, John

12 Sanders, and he had contacted me first, the way

13 I'm recalling, and he connected with my old boss,

14 Derek Chang, and Derek had recommended me for

15 this.

16 Q And was Derek Chang a boss from

17 DirecTV then?

18 A Yes.

19 Q And so it was actually Mr. Sanders

20 that contacted you first, and then Mr. Lutzker?

21 A Yes.

22 Q And do you recall speaking with Raoul

92

1 Galaz?

2 A I do.

3 Q And that was approximately when? That

4 was March of 2014?

5 A Yes, early March.

6 Q At the time, I think you said you just

7 had one conversation with him; is that correct?

8 A Yes.

9 Q Did you exchange emails with him or

10 were there emails sent to you from Mr. Galaz?

11 A He sent me an email.

12 Q And you responded, do you recall?

13 A I did not.

14 Q At the time that you spoke with Mr.

15 Galaz, did you recall informing him as to whether

16 or not you had any familiarity with these

17 proceedings?

18 A I don't believe we discussed that.

19 Q I assumed you discussed the

20 proceedings, yes?

21 A Yes.

22 Q And did you tell him that you were

93

1 familiar with the proceedings?

2 A Again he -- I didn't recognize that it

3 was the same proceedings until very, very late in

4 the conversation.

5 Q Okay. Once you did, did you tell Mr.

6 Galaz that you already had some involvement in

7 the proceedings?

8 A No.

9 Q And do you recall, did Mr. Galaz tell

10 you how he came to contact you?

11 A Yes.

12 Q And what was that?

13 A Through Mike Nielsen.

14 Q And you explained that Mike Nielsen

15 was an attorney. How did you know Mike Nielsen

16 or how did he know you?

17 A Mike Nielsen was an attorney for

18 DirecTV, and assisted on local into local retrans

19 deals.

20 Q And had you worked with him in the

21 past then?

22 A At DirecTV.

94

1 Q And prior to Mr. Galaz contacting you,

2 did Mr. Nielsen contact you and tell you that Mr.

3 Galaz had been referred to you?

4 A Right, yes.

5 Q And did Mr. Nielsen tell you anything

6 further about what the content was?

7 A No.

8 Q I believe you testified that Mr. Galaz

9 emailed you a document?

10 A Yes.

11 Q And what was that document, to the

12 best of your recollection?

13 A I don't know. I didn't open it.

14 Q Okay. Did you forward any of your

15 emails from Mr. Galaz to anyone else?

16 A Yes.

17 Q And to who?

18 A To Arnie Lutzker.

19 Q Did you forward the email with the

20 attachment to Mr. Lutzker?

21 A Yes.

22 Q Did Mr. Lutzker ever discuss that

95

1 attachment with you?

2 A No.

3 Q Did you ever discuss that attachment

4 with Mr. Lutzker?

5 A No.

6 Q Are you aware -- I believe you

7 testified that it was your understanding that Mr.

8 Galaz sent documents to Mr. Nielsen?

9 A No, I did not testify to that.

10 Q My apologies. Did you have any

11 awareness that Mr. Galaz did send documents to

12 Mr. Nielsen?

13 A No.

14 Q Did Mr. Nielsen ever communicate with

15 you after your conversation with Mr. Galaz about

16 Mr. Galaz and possibly working with him?

17 A He, I believe, emailed or called and

18 just said I -- something like I hope it works out

19 or if it works out, that's fine, or something

20 along those lines. I don't actually recall, but

21 it was very brief.

22 Q Was there any substance to your --

96

1 have substance -- excuse me. Was there any

2 substance in your conversation with Mr. Nielsen

3 you just described, about Mr. Galaz's document

4 that he had sent to Mr. Nielsen?

5 A No.

6 Q So did Mr. Nielsen ever describe the

7 document to you?

8 A No.

9 Q Is it -- do you recall or are you

10 familiar with whether or not in June 2012, a new

11 CEO was installed at DirecTV named Michael White?

12 A Yes.

13 Q When did you leave DirecTV?

14 A July of 2013.

15 Q And what was the reason for your

16 leaving?

17 A I was ready to move on after close to

18 15 years.

19 JUDGE STRICKLER: Did you say the new

20 CEO was in June of '14, 2014, or 2013?

21 MR. BOYDSTON: Well, I said '10.

22 JUDGE STRICKLER: I'm sorry.

97

1 JUDGE BARNETT: No, I think he said
2 '12.
3 THE WITNESS: I think you said '12,
4 but it was '10.
5 MR. BOYDSTON: I beg your pardon.
6 JUDGE STRICKLER: Well, let's listen
7 to what the witness has to say, because she's the
8 only one testifying. What year was the new CEO?
9 THE WITNESS: You know, I think it was
10 2010. There was quite a few, so I'm not quite
11 sure what date, when he started.
12 BY MR. BOYDSTON:
13 Q While you at DirecTV -- well actually
14 strike that. Is it accurate to say that you're
15 being offered here as an expert on the subject of
16 local to local retransmission of broadcast
17 stations by satellite and cable system operators?
18 A What was the question?
19 Q I'm sorry. I'm just confirming on
20 your expert -- the reason you're here is to
21 testify as to your expertise with regard to the
22 subject of local to local retransmission of

98

1 broadcast stations by satellite and cable
2 operators?
3 A Correct.
4 MR. MACLEAN: Objection,
5 mischaracterizes --
6 JUDGE BARNETT: Sustains.
7 MR. MACLEAN: --the witness'
8 expertise.
9 MR. BOYDSTON: I'm sorry. I didn't
10 catch what the objection was.
11 MR. MACLEAN: It was sustained.
12 MR. BOYDSTON: I know that.
13 MR. MACLEAN: The objection was it
14 mischaracterizes the witness' expertise.
15 MR. BOYDSTON: Okay.
16 JUDGE BARNETT: Well, it might not
17 mischaracterize her expertise, but it
18 mischaracterizes what she was qualified to
19 testify to as an expert.
20 MR. BOYDSTON: Thank you, Your Honor.
21 Is the answer then stricken or is it on the
22 record?

99

1 JUDGE BARNETT: The answer's stricken.
2 MR. BOYDSTON: Okay. I was just
3 trying to clarify.
4 JUDGE BARNETT: If she answered, I
5 didn't hear the answer, so the objection was
6 sustained.
7 MR. BOYDSTON: Understood.
8 JUDGE BARNETT: Start from there.
9 BY MR. BOYDSTON:
10 Q Got it. Are you familiar with the
11 satellite statements of account that must be
12 prepared by entities such as DirecTV?
13 A I'm aware of them, yes.
14 Q Sounds like you probably didn't
15 prepare them then. That was someone else's job?
16 A Correct.
17 Q What's your understanding of them?
18 A That twice a year our supplier
19 payments person would calculate what was owed and
20 submit them to the Copyright Tribunal.
21 Q And I beg your pardon. When did you
22 start at DirecTV again?

100

1 A I started in October of 1998.
2 Q Thank you. So I believe that you
3 stated that satellite carriers did not have the
4 ability to carry local broadcast stations until
5 1999; is that correct?
6 A Yes. The exact date of the passing of
7 the liability was late '99, early 2000.
8 Q Okay. Despite that, do you have an
9 understanding as to how -- whether or not prior
10 to 1999, satellite carriers could carry signals
11 distantly, going back to 1988?
12 A Right. There was, and that is not my
13 area of expertise, but they did have the ability
14 to carry the Big Four into DMAs, other DMAs.
15 Q And the Big Four are?
16 A ABC, NBC, CBS and Fox.
17 Q Okay. You said that's not your area
18 of expertise. Specifically what do you mean?
19 A Right, because what I did at DirecTV
20 was, as I testified, when we got the right to
21 open local into local or to start broadcasting
22 local stations in DMAs, that's when I started to

101

1 do those deals. I wasn't involved in those deals
2 or any kind of deals with local into local and
3 distant network prior to that time.

4 Q Okay. So prior to that time, you
5 weren't involved with local into local or distant
6 you said; correct?

7 A Correct.

8 Q Okay, but then after that time, you
9 were involved with local to local?

10 A Yes.

11 Q Were you involved in local to distant,
12 or excuse me, were you involved in distant?

13 A Yes, I was.

14 Q Okay. Now you said that you oversaw
15 the launch of 2,100 stations and 143 DMAs;
16 correct?

17 A Yes.

18 Q Now isn't it true that only about 50
19 of those stations were distantly retransmitted?

20 A That's correct.

21 Q So the vast majority were local to
22 local?

103

1 at least one local station. So now, because we
2 made that decision, we'll carry all of them;
3 correct?

4 A That's correct, in the DMA.

5 Q And that was actually -- and that was
6 required by law?

7 A Right.

8 Q Now in that circumstance, you -- well,
9 strike that. In a situation like that, to the
10 extent that there was one or maybe a couple of
11 stations locally that you wanted to transmit,
12 with regard to the other stations that you
13 weren't particularly being motivated by, did you
14 look at ratings to make a decision of whether or
15 not to carry one and carry all?

16 A Are you talking about in the DMA or
17 outside of the DMA?

18 Q Local to local in a DMA.

19 A I didn't have a choice. Either they
20 carry -- elected must-carry, in which case I must
21 carry them, or elected retrans, in which we would
22 have an opportunity to negotiate. So within that

102

1 A Yes.

2 Q And so when you say that you oversaw
3 the launch of 2,100 stations and 143 DMAs, you
4 primarily are saying you were in charge of the
5 local to local retrans -- local to local
6 transmission, not a retransmission; correct?

7 A My -- let me explain. My duties were
8 everything regarding local into local, the must-
9 carry station election, then the retransmission
10 consent, and then the decisions of what stations
11 we would distribute into DMAs outside of the
12 station's DMA.

13 Q Okay. Now are you familiar with the
14 carry one, carry all rule?

15 A Yes.

16 Q And that rule essentially states that
17 if a satellite carrier decides it's going to
18 carry one local station, it's got to agree to
19 carry all local stations; correct?

20 A That's correct.

21 Q And in that situation, you would make
22 the decision okay, we want to carry some, some,

104

1 process, there wasn't a Nielsen ratings element.
2 It was carry one, carry all.

3 Q Okay. Now in that kind of a
4 situation, I believe that cost was the overriding
5 concern, correct, as to whether or not to carry
6 one -- carry all of the local stations?

7 A Which costs are you referring to?

8 Q Well, I probably should have asked you
9 that first. Let me back up a step. When you
10 were making that decision about whether to carry
11 one and all local stations, was cost a
12 consideration?

13 A Yes. So like I testified before, we
14 went into a DMA. We looked at quite a number of
15 things. First of all, how many DirecTV
16 subscribers were in the DMA. We looked at the
17 topography, because in highly saturated markets
18 with multiple dwelling units, DirecTV did not do
19 as well, because cable was very entrenched.

20 We looked at the station lineup. We
21 at that time did not have our own installers. So
22 we looked to make sure that there was a strong

105

1 installer base there. We also looked -- also at
2 that time, we worked with big box retailers and
3 small mom and pop stores. So we looked to see if
4 we had enough stores there.

5 And then finally, we would install a
6 local collection facility, and we would like to
7 see which signals we were able to pick up at that
8 local collection facility. So there was an
9 absolute cost in every decision.

10 Q Now in terms -- you discussed earlier
11 negotiating with local stations. Do you recall
12 that?

13 A Yes.

14 Q Now that only occurred if the local
15 station exercised its right to demand its consent
16 to be broadcast locally; correct?

17 A They would elect retransmission
18 consent, and then we would negotiate.

19 Q So essentially you'd go into a DMA and
20 say okay, we want to have the local stations.
21 That means you have to carry one and carry all;
22 correct?

106

1 A Right.

2 Q But amongst those local stations, they
3 could say well, we're opting out of this, and
4 we're demanding that you get our consent. Is
5 that a fair way to describe it?

6 A Well, you wouldn't say "opt out."
7 They would either decide to elect must-carry or
8 elect retrans.

9 Q And if they elect retransmission
10 consent, essentially that local station is saying
11 is we won't allow you to retransmit us or
12 transmit us, I should say, unless you pay us some
13 money?

14 A They would -- it would be a
15 negotiation, exactly.

16 Q Right. Now in a situation of deciding
17 whether or not to rebroadcast a distant signal,
18 there was no negotiation; correct?

19 A That's correct.

20 Q And that's because the right to do
21 that was obtained by paying the compulsory
22 license; right?

107

1 A That's correct.

2 Q And so a distant retransmission was
3 essentially mutually exclusive with a local, the
4 local transmission; correct?

5 A Do you want to ask me that a different
6 way. I don't understand the way you're asking.

7 Q You know, I'll withdraw the question.
8 The point's covered. In the distant
9 retransmission context, there was no negotiation
10 with the signal or with the station, I should
11 say, whereas in local to local, where
12 retransmission consent was being raised, there
13 was negotiation. So they were fundamentally
14 different in that regard; correct?

15 A Yes.

16 Q Now you understand that these
17 proceedings only concern situations, royalties
18 collected for the right to retransmit distant or
19 distantly retransmit a broadcast?

20 A Yes.

21 MR. MACLEAN: Objection to that
22 characterization.

108

1 MR. BOYDSTON: As far as I know,
2 that's where you are.

3 JUDGE BARNETT: What's objectionable?

4 MR. MACLEAN: Well Your Honor, these
5 proceedings are about allocating royalties that
6 were paid for distant retransmissions. That's a
7 different question than --

8 MR. BOYDSTON: I think I just asked if
9 that the subject of the proceedings, and she said
10 yes.

11 MR. MACLEAN: I'll withdraw the
12 objection.

13 JUDGE BARNETT: Thank you.

14 BY MR. BOYDSTON:

15 Q Are you familiar with -- you're
16 familiar with pay-per-view orders, I have no
17 doubt?

18 A Yes.

19 Q And you understand that this
20 proceeding has nothing to do with the popularity
21 of programming, as reflected or demonstrated by
22 pay-per-view; correct?

109

1 A Yes.

2 Q Did DirecTV look at retained or
3 increased subscribership, and if so, how did it
4 tie that into distant retransmission royalties?
5 In other words, did DirecTV sit down on a
6 periodic basis and say "Gee, the distantly
7 retransmitted stations that we're paying a
8 compulsory license for, are resulting in certain
9 subscribership numbers"?

10 A Well, let me explain. So there's the
11 DMA, where all of the stations are carried, and
12 then they would be a neighboring DMA, and I would
13 look at the neighboring DMA to see if there were
14 some stations that I could distantly import, that
15 filled a niche, that were popular, that perhaps
16 cable was carrying but DirecTV wasn't carrying,
17 or I felt would be a strong asset to that lineup.
18 I primarily use Nielsen ratings, and
19 if I was able to, I would import that signal. I
20 would distantly transmit that station into the --
21 and also that DMA had to be unserved. So that
22 station could not -- they couldn't have that

110

1 station in that DMA.

2 So if that DMA had an ABC already, I
3 couldn't import or distantly transmit the ABC.
4 So it had to be unserved is the vernacular.

5 Q So when you were looking at that and
6 trying to make that decision, you said you were
7 usually looking to see if you could fulfill a
8 particular niche; correct?

9 A Yes.

10 Q Now a niche I consider by definition
11 to be something that is not broad, a subject
12 matter that's -- a niche. It's smaller. Is that
13 your understanding?

14 A The way that I looked at niches were
15 a subset of subscribers that might enjoy this
16 popular programming in certain categories.

17 Q So I mean for instance, something with
18 wide popularity like Monday Night Football
19 obviously is not niche programming, or is it?

20 A Sports you probably wouldn't
21 characterize as niche, the way that I
22 characterized it as niche.

111

1 Q Now when you were trying to determine
2 -- when you were looking for programs or stations
3 rather that would fulfill various niches, you
4 were looking -- you had to look at stations as
5 opposed to programs, right? In other words --
6 let me restate that.

7 When you were making this decision,
8 you were looking for niche programming; correct?

9 A Right.

10 Q But your choice was not the ability to
11 purchase the rights to retransmit a particular
12 program; it was to retransmit the station the
13 program was on; correct?

14 A That's correct.

15 Q So in doing that, you had looked at
16 the program certainly, but you knew that what you
17 were going to be paying for is not just the
18 program, but the whole station, all of the
19 programs on the station; correct?

20 A That's right. I would import that
21 entire station.

22 Q And to the extent that that station

112

1 might have very highly rated programs like
2 Everyone Likes Raymond, but that might not drive
3 your decision if what you were looking for is
4 something in niche like a cooking show. Is that
5 fair to say?

6 A I would primarily -- I don't think you
7 could make it that granular. I would primarily
8 look at the ratings of the entire station.
9 Sometimes it was driven by a hit show or a
10 popular show. But I, because there was, you
11 know, I needed to tell my management why I was
12 making this decision, I again looked at the
13 lineup of the ratings, and then the ratings were
14 primarily bolstered by hit shows or popular
15 shows.

16 JUDGE STRICKLER: Did you say a
17 moment ago, in answering counsel's questions,
18 that you look at two different things to
19 determine whether you would import from Market 2,
20 DMA 2 into DMA 1, one being the ratings that you
21 just testified to, but also whether or not that
22 station was on the cable -- was a cable-available

113

1 station in DMA 1?

2 THE WITNESS: Is DMA 1 the original

3 DMA or DMA --

4 JUDGE STRICKLER: DMA 1 is the

5 original one.

6 THE WITNESS: Okay. So --

7 JUDGE STRICKLER: So you wanted to

8 look -- if you wanted to also look to see if you

9 wanted to get that cable, in DMA 1 that station

10 was available on cable but wasn't yet available

11 on DirecTV.

12 So did you sort of say well, something

13 in the profit ratings. Do we want to meet the

14 competition, and get that station here in DMA 1

15 as well, so we can tell potential and existing

16 subscribers you don't have to be on cable to get

17 the station. You can get it on DirecTV?

18 THE WITNESS: So just to make, to

19 clarify, DMA 1 is the DMA that I am carrying one,

20 carrying all. DMA 2 is where I'm distantly --

21 JUDGE STRICKLER: DMA 1 is the

22 importer; DMA 2 is the exporter.

114

1 THE WITNESS: So I don't want to

2 emphasize too much the cable lineup, because

3 cable was renowned for carrying a lot of stations

4 that did not make a lot of sense. So it was

5 never apples to apples. I would look to see what

6 was there, and to see if my lineup was missing

7 something. But I would always go back to a

8 ratings, to make that determination.

9 JUDGE STRICKLER: This might not be

10 something you can answer, but you just said that

11 you noticed that cable would include a number of

12 stations that didn't make a lot of sense. Why

13 would cable have stations that didn't make a

14 whole lot of sense?

15 Or let me back up for a second. Did

16 they not make sense because they didn't have good

17 ratings, but they kept them on?

18 THE WITNESS: So let me answer it in

19 two parts. The reason that they might carry a

20 station that I'm saying didn't make a sense or

21 wasn't popular is sometimes with retransmission

22 consent, you're obliged to carry other of the

115

1 station group's stations or other things that

2 they have --

3 JUDGE STRICKLER: That are commonly

4 owned you mean?

5 THE WITNESS: Exactly.

6 JUDGE STRICKLER: So you're buying

7 the bundle?

8 THE WITNESS: Right, or there was a --

9 there was a reason. There was, you know, cable

10 just tended to really appeal to a large mass, and

11 they were kind of, in my mind, renowned for

12 carrying different things that might not have

13 really moved the needle.

14 And because at DirecTV there was a,

15 you know, I had to back up my decisions and there

16 was money involved, and I was a cost center, I

17 would not carry that entire lineup.

18 JUDGE STRICKLER: In addition to

19 cable carrying stations that weren't necessarily

20 popular because they had to be acquired in a

21 bundle, as you testified to, did cable also

22 acquire stations simply because they had -- they

116

1 represented certain types of niche genres that

2 might appeal to the marginal subscriber?

3 THE WITNESS: The cable operator?

4 Perhaps, you know. What I noticed was that there

5 were all sorts of reasons. In one DMA, a station

6 was carried because the CEO's wife was on the

7 staff. In other DMAs, you know, it was a bundle.

8 In others, it was kind of an odd one-off kind of

9 public service, you know, some station that maybe

10 just didn't really resonate with my demo, with my

11 demographic.

12 JUDGE STRICKLER: Thank you.

13 BY MR. BOYDSTON:

14 Q In response to one of the questions,

15 you said about these cable stations, that your

16 observation was there were channels which -- you

17 used different phrases. But one was you said it

18 didn't seem -- the cable stations tended to carry

19 -- sorry. Cable systems tended to carry stations

20 that didn't move the needle.

21 When you say "didn't move the needle,"

22 I presume you mean didn't have particularly

117

1 impressive ratings?

2 A That's correct.

3 Q Now going back just a little bit, with

4 regard to DirecTV, did DirecTV analyze whether or

5 not it was achieving increased subscribership due

6 to particular distant retransmissions, if you

7 know?

8 A Are you asking me because of one

9 particular station, did they analyze?

10 Q Yes.

11 A I don't know. My experience was is

12 that we took everything as a whole. So --

13 Q And when you say you took everything

14 as a whole, are you -- well, strike that. Well,

15 could you expand on when you say "everything as a

16 whole"?

17 I asked it, and I did ask a very, very

18 specific question, which was whether or not

19 anyone at DirecTV sat down and said you know,

20 that distantly retransmitted station we've just

21 been paying for for three years, it's increased

22 our subscribership or it's decreased our

118

1 subscribership? Your answer is you don't think

2 anyone made an analysis that specific, but there

3 may have been some more general analysis done?

4 A Yeah. I mean so there were certain

5 instances where I may have imported a distant

6 signal, where we had a big jump in subscribers.

7 So patting myself on the back, I could certainly

8 say that was it.

9 But so we didn't get as granular to

10 the specific station, but we would take into

11 account a lot of different aspects of what was

12 going on in each DMA, and we were quite focused

13 on what was again moving the needle in each DMA.

14 Q I'm sorry, you were or were not?

15 A We were.

16 Q You were. Now my understanding is,

17 though, is that DirecTV almost never dropped any

18 retransmitted stations; correct?

19 A Yes.

20 Q So once a retransmitted station was --

21 excuse me. Once DirecTV made the decision to pay

22 the compulsory license to retransmit a particular

119

1 station, after that it almost always continued

2 doing so; correct?

3 A We would continue doing so until that

4 DMA was served, for that particular station.

5 Q So you didn't -- DirecTV didn't go

6 back and say you know what? The ratings on this

7 particular -- the ratings we see for this

8 particular station we're paying a license on for

9 three years are lousy. We're discontinuing

10 paying the retransmission fee. That didn't

11 happen; correct?

12 A I don't believe so, no.

13 Q Now is it -- I believe that -- well,

14 you tell me. My understanding is that between

15 1999 and 2003, DirecTV only distantly

16 retransmitted between nine and eleven stations,

17 primarily stations from New York, Los Angeles and

18 Chicago. Is that correct do you think?

19 A What years?

20 Q '99 to 2003, just a handful of

21 stations from LA, New York, Chicago?

22 A Perhaps. I don't know exactly.

120

1 Q Yeah. Do you have any reason to

2 believe that's not the case?

3 A I would really to need to see. That

4 was quite some time ago, so I really need to see,

5 you know, the list of who we imported and what

6 the dates were.

7 Q Okay. There's a binder over there

8 which I'll help you with, and Your Honor, may I

9 approach?

10 JUDGE BARNETT: You may.

11 BY MR. BOYDSTON:

12 Q I'd like to take a look at what's been

13 marked as Exhibit 141. Now I'll represent to you

14 that this is a document that was prepared by IPG,

15 and these figures are, as I said, was prepared by

16 IPG.

17 I'd ask you to look at this, only to

18 the extent that looking at these numbers might or

19 might not refresh your recollection as to the

20 number of stations DirecTV was retransmitting

21 between 1999 and 2003, based upon what's on this

22 page.

121

1 A And sorry. Your question is?

2 Q Does this refresh your recollection as

3 to whether or not my representation might be

4 accurate, that between '99 and 2003, DirecTV only

5 rebroadcast about eight to nine stations?

6 A I don't know, but you have it here so

7 --

8 Q Okay. Do you have a recollection over

9 any of your time at DirecTV, as to how many --

10 well strike that. Between 2004 and 2009, do you

11 recall that DirecTV only distantly retransmitted

12 between 34 and 50 stations?

13 A Right, yes.

14 Q Okay, and during that time, the number

15 of stations that were locally retransmitted was

16 quite large?

17 A Yes.

18 Q In the thousands?

19 A Yes.

20 Q Given that disparity, I imagine there

21 was a lot more focus at DirecTV on looking at

22 local, the transmission of local stations, rather

122

1 than the retransmission of distant stations?

2 A Our primary focus was to get more DMAs

3 served, yes.

4 JUDGE FEDER: Excuse me. Would you

5 just clarify what you mean by getting more DMAs

6 served?

7 THE WITNESS: Sure. So we would want

8 to launch more DMAs, because that would enable us

9 to compete against cable. Once we had local

10 stations in the DMA, it really solidified our

11 place, our place in the market. So we would want

12 to expand that.

13 JUDGE FEDER: So by serving a

14 particular DMA, you mean going in and getting

15 retransmission consent deals with local stations

16 for local into local retransmissions?

17 THE WITNESS: Exactly, or they could

18 elect must-carry.

19 JUDGE FEDER: Right, okay.

20 BY MR. BOYDSTON:

21 Q Of the handful of stations that were

22 distantly retransmitted, do they primarily come

123

1 from sort of the big media hubs like LA, New

2 York, Chicago?

3 A It just depended on a number of

4 different things. So that's hard to say.

5 Q Did amongst those, were the stations

6 that were distantly retransmitted by DirecTV

7 during that time from New York, LA and Chicago?

8 A Yes.

9 Q Were there -- were there other places

10 that you can recall that they were distantly

11 transmitted from?

12 A We -- I made the decision to import

13 from a number of different cities, just depending

14 on our spot beam technology, or where I thought

15 the most popularity would be. So it didn't make

16 sense to import like a Telefutura from Miami to

17 Wichita, Kansas. It just wouldn't be that

18 popular or make any sense.

19 Q Right, whereas stations like the ABC

20 affiliate in New York would probably be something

21 that a lot of people would be interested in

22 theoretically, right?

124

1 A You would think.

2 Q You testified that there was explosive

3 growth in satellite retransmission between 1999

4 and 2009. Is it fair to say that at least with

5 regard to DirecTV, that explosive growth was in

6 the local to local context?

7 A You cannot characterize it just

8 because of local into local. There were a number

9 of reasons. But we were able to compete on an

10 even playing field when we had local stations in

11 a market.

12 Q When you had local stations in a

13 market, right? Right. And so, I mean, we're

14 talking about explosive growth. 21,000

15 retransmissions, or rather 21,000 locally

16 transmitted stations is a lot of stations. That

17 implies explosive growth from some lower number.

18 Is that what you mean when you're talking about

19 explosive growth?

20 A 2,100.

21 Q I'm sorry.

22 A 21,000.

125

1 Q I stand corrected.

2 A But so let me explain that. So when
3 we had explosive growth, again local into local
4 lead us on an even playing field. But we were
5 really able to compete effectively on a number of
6 different aspects, because the signal quality was
7 so much better.

8 Our cost centers, our CSRs, there were
9 a lot of other issues. So local into local was
10 sort of the foundation, and then we went from
11 there.

12 Q Okay. Now DirecTV didn't actually
13 order ratings data from Nielsen itself; correct?
14 It obtained them from advertisers and things like
15 that?

16 A We had a number of different groups
17 that supplied -- within DirecTV, we had a number
18 of different groups that would supply information
19 to me. We had a research group, a business
20 analytics group, an advertising group and a
21 customer service group, and many of them have
22 access to Nielsen information that I relied on.

127

1 ratings -- when you said you got ratings for
2 everything, you got ratings for everything that
3 you could within a DMA, right?

4 A Yeah, and then we would also get
5 nationals. We would get regional. We cut our --
6 the research in every which way.

7 Q But DirecTV never engaged Nielsen to
8 study distant ratings?

9 A No.

10 Q Did DirecTV ever look at ratings
11 according to the timing of programs, ratings
12 during a particular time block or a time of the
13 day, in order to determine whether or not it was
14 filling a gap of lower ratings on other DirecTV
15 broadcasts?

16 A I would look at day parts, in addition
17 to overall ratings, and again, I would look at
18 some of the breakout, more popular programming as
19 well.

20 Q Turning to the subject here, which is
21 about devotional programming or religious
22 programming as sometimes it's called, is it your

126

1 Q But it sounds like there wasn't a
2 formal relationship between DirecTV and Nielsen,
3 where DirecTV was paying for a bunch of
4 information, including underlying data and stuff
5 like that?

6 A That's correct.

7 Q And so did the Nielsen information you
8 got, it was just what was given to you by other
9 people or entities; correct?

10 A Yes.

11 Q And it was -- there was the Nielsen
12 data that DirecTV got, it was just for local
13 ratings; correct?

14 A We got Nielsen ratings for everything,
15 every broadcaster, every cable network. We
16 looked at Nielsens for everything.

17 Q But within a given DMA; correct?

18 A No. We would look at everything in a
19 DMA, how every network was doing as well.

20 Q Within a DMA; correct?

21 A Yes.

22 Q Right. In other words, you got

128

1 understanding that religious programming was a
2 fairly small portion of overall programming
3 appearing on distantly retransmitted stations?

4 A Was it a small portion of the
5 distantly retrans?

6 Q Correct.

7 A I don't know.

8 Q Was it a small portion of DirecTV's
9 programming generally?

10 A Yes.

11 Q Would you say something on the order
12 of three percent?

13 A I don't know the exact percentage.

14 Q Okay. You had a general knowledge as
15 to whether or not religious shows generally
16 garner large or small ratings relative to other
17 programming?

18 A Relative to other programming, it
19 garnered smaller ratings.

20 Q Do you consider -- well, we talked
21 about niche programming. Would Spanish language
22 programming be niche programming, or is it bigger

129

1 than that?

2 A Spanish is a niche.

3 Q Okay. Now let's go back to the niche
4 issue again. If you have two channels with
5 identical niche programming, in other words like
6 two different children's shows. They're
7 different shows, but they fit the same niche, or
8 let me strike that.

9 Let's say you're looking at your
10 lineup in a particular DMA, and you have a
11 children's show, and it garners some ratings, but
12 ratings that are small relative to other non-
13 niche programming. Then you're taking into
14 consideration whether to use another local
15 station that has other children's programming on
16 it.

17 Even if that other program with other
18 children's programming had ratings that were
19 relatively attractive, would you take into
20 consideration whether or not bringing that into
21 your lineup would simply displace the viewership
22 that was already being garnered by the existing

130

1 niche programming, in this case a children's
2 show?

3 A I'm not sure what you're asking me.

4 Q I'm try a different -- I'll try a
5 better way if I can, and I'm focusing on your
6 making the decisions about niche programming, and
7 I guess what I'm really wondering is wouldn't
8 your decision signs by influenced by the thought
9 that well, there's interesting niche programming
10 over here, a cooking show let's say, but I've
11 already got these cooking shows here.

12 So because of that, even though this
13 show is good, gets nice ratings and everything,
14 I'm not really adding anything new. At most, the
15 people who watch my existing show might just
16 continue to watch cooking shows on this new
17 channel, and so maybe it doesn't add much. Did
18 you ever have analysis like that?

19 A Yes, exactly. I would see what was in
20 a DMA. I'm assuming you're talking about
21 distantly broadcast, and I would see what would
22 be needed to round out the lineup, and what would

131

1 add new subscribers or keep existing subscribers.

2 Q And if a show wasn't helping to round
3 out, then it might not be of much interest,
4 right?

5 A If a station, yeah. If a station --
6 I used to say if a station wasn't going to sing
7 for itself or work for me, I would not bring it
8 in.

9 Q And you used the term "round out." I
10 think we all pretty much know what you mean. But
11 in this context, when you say "round out," what
12 it means is is that okay, I think round like a
13 wheel. We've got different types of programming.

14 We seem to have all this covered.
15 This other station, while it looks kind of cool,
16 it's in the part that's already covered. So it
17 doesn't round out the station. Is that a fair
18 way to put it, or it doesn't round out the
19 DirecTV lineup?

20 A If it didn't round it out or if I
21 thought that by adding a station that had a niche
22 that might bring me more subscribers, I would

132

1 normally go with the station that has the niche,
2 that would bring me more subs.

3 Q But if it's a niche that's already
4 covered, it probably wouldn't bring new
5 subscribers. Fair enough?

6 A Perhaps.

7 Q You used the example earlier on about
8 the Japanese station that got dropped, and then
9 everyone got mad. Do you recall that?

10 A (No audible response.)

11 Q And I don't think I quite caught your
12 explanation. I think I just didn't hear part of
13 the words. I imagine that that Japanese
14 programming, the station with Japanese
15 programming, was low rated relative to all of the
16 programming, because it was a fairly targeted
17 audience; correct?

18 A And let me be clear. It was a cable
19 network. It wasn't a station, and it was very
20 low rated.

21 Q And you said that the decision was
22 made well, we don't need to keep carrying this,

133

1 and then the hue and cry was so great, that you
2 got calls at home and things like that, and the
3 reaction was all right. Well, it's low-rated,
4 but apparently people feel passionately about it
5 I guess, right?

6 A There is a passionate group for every
7 station, yes.

8 Q And so you recognize that regardless
9 of the fact it was low rated, it was worth
10 carrying?

11 A Well, I wouldn't say it was worth
12 carrying, because it was extremely low rated. It
13 was taking up very valuable bandwidth, and we
14 were able to contain the cry. But we learned a
15 very valuable lesson when we dropped that, and we
16 decided that we would not do that in the future,
17 because we didn't want to upset our base, to lose
18 subscribers, overwhelm our call center by having
19 to make people call in or get bad publicity.

20 Q So there were business reasons to keep
21 it; correct?

22 A There were business reasons to keep

134

1 it, yes.

2 JUDGE STRICKLER: In that particular
3 situation, how important was bad publicity
4 relative to the other factors?

5 THE WITNESS: It was important for
6 DirecTV not to get bad publicity.

7 JUDGE STRICKLER: I understand that,
8 but was there actual bad publicity that you were
9 experiencing with regard to the removal of that
10 Japanese station?

11 THE WITNESS: I don't believe so. It
12 was really long ago, and it was a very vocal
13 constituency. But I don't believe we got bad
14 publicity from it.

15 BY MR. BOYDSTON:

16 Q I understand that you've never worked
17 for a CSO; correct?

18 A Correct.

19 Q Nevertheless, based upon your
20 familiarity with people who have, is it your
21 understanding that they have a similar view of
22 the necessity for niche programming?

135

1 A Yes.

2 Q Do you know, and I don't know if you
3 would have occasion to know this, but do you know
4 how many signals a CSO typically retransmits
5 distantly?

6 A No.

7 Q You've brought up the term "unserved
8 household" earlier.

9 A Right.

10 Q Could you -- well is it -- my
11 understanding is that an unserved household is a
12 legal rule that says that in order to receive a
13 distant network station, the household has to be
14 unserved, meaning it doesn't -- it isn't getting
15 a network feed or something like that?

16 A Yeah. The way that I would describe
17 it is in that DMA, if a station does not exist.
18 So it's unserved for that particular station.

19 Q Okay. Now in a situation like that,
20 the decision where to distantly retransmit a
21 signal may have more to do with the viewer
22 qualifying as an unserved household, than the

136

1 ratings of a potential station; correct?

2 A I could not bring in a distant network
3 signal if that DMA had that -- I testified to
4 this -- if that signal was already being
5 broadcast in that DMA.

6 Q No matter how great the ratings might
7 be, that just couldn't be done?

8 A Could not be done. Let me clarify.
9 There were very corner cases where I might get
10 permission from the existing station to bring in
11 the distant, the competing distant signal, but
12 that's not a -- it was very difficult to get that
13 permission.

14 MR. BOYDSTON: Thank you. I have
15 nothing further.

16 JUDGE BARNETT: Do you have more
17 questions Mr. Olaniran?

18 MR. OLANIRAN: No questions, Your
19 Honor.

20 REDIRECT EXAMINATION

21 BY MR. MACLEAN:

22 Q Now Mr. Boydston asked you a question

137

1 about whether you forwarded the email from Mr.
 2 Galaz, with an attachment to Mr. Lutzker; is that
 3 right?
 4 A Yes.
 5 Q That was recent; correct?
 6 A Yes, that was recent.
 7 Q When was that?
 8 A It was within the last 30 days.
 9 Q Since IPG started raising allegations
 10 that it may have sent you confidential
 11 information?
 12 A Yes.
 13 Q In the course of preparing your
 14 testimony, your written testimony in this matter,
 15 did you consider or incorporate anything from
 16 what you received from Mr. Galaz?
 17 A I did not.
 18 Q Did you discuss anything that you
 19 received from Mr. Galaz with any of the counsel
 20 for the SDC?
 21 A I did not.
 22 Q Did you show us at that, that is prior

138

1 to your written testimony, or at any time before
 2 just recently, any email that you had received
 3 from Mr. Galaz?
 4 A I did not.
 5 MR. MACLEAN: Nothing further, Your
 6 Honor.
 7 MR. BOYDSTON: Nothing further.
 8 JUDGE STRICKLER: I have a couple of
 9 questions for her.
 10 JUDGE BARNETT: Ask.
 11 JUDGE STRICKLER: Okay. I'm going to
 12 direct you to page eight of your written
 13 testimony, Ms. Berlin. Tell me when you're
 14 there.
 15 THE WITNESS: Yes.
 16 JUDGE STRICKLER: Thanks. In
 17 footnote seven, you make reference to the FCC
 18 mandate that DirecTV take four percent of its
 19 capacity, about ten channels for non-commercial
 20 channels. Do you see that?
 21 THE WITNESS: Yes.
 22 JUDGE STRICKLER: In the next

139

1 sentence, you testify "Many religious channels
 2 applied for the PIO, Public Interest Obligation
 3 channel spots," right?
 4 THE WITNESS: Yes.
 5 JUDGE STRICKLER: Of those many
 6 religious channels that applied for it, how many
 7 got it?
 8 THE WITNESS: I really don't recall,
 9 but most of them did. It's -- that's pretty much
 10 who applied for that carriage.
 11 JUDGE STRICKLER: So if they got
 12 those PIO spots, you were running those to
 13 fulfill a statutory obligation, not to -- not
 14 because they were highly rated within a niche or
 15 otherwise?
 16 THE WITNESS: These were mostly cable.
 17 A lot of them were cable networks, and we carried
 18 -- they weren't stations, although some of them
 19 did have stations. But these were carried
 20 nationally as a cable network.
 21 JUDGE STRICKLER: And your decision
 22 to carry them was based on your obligation at

140

1 DirecTV to fulfill that FCC requirements, as
 2 opposed to promote ratings?
 3 THE WITNESS: The public interest
 4 platform, we needed to balance a number of
 5 issues. So popularity of programming, ratings,
 6 what the network looked like, who it would
 7 attract, and in these particular instances,
 8 actually that's what we would look at, and who
 9 else was in the pot is what I was going to say.
 10 So it was a little bit of a tightrope,
 11 because it was a very competitive group that
 12 wanted the ten or whatever it became. Each year
 13 we had to recount.
 14 JUDGE STRICKLER: It was a
 15 competitive --
 16 THE WITNESS: The group that applied
 17 --
 18 JUDGE STRICKLER: For the PIO
 19 designation?
 20 THE WITNESS: Yeah. It was very
 21 competitive. It was very -- folks that didn't
 22 get it were very angry. So we had to be very

141

1 careful how we went about the process.

2 JUDGE STRICKLER: So what factors did

3 you consider specifically -- well, this is a

4 religious niche we're talking about. What

5 factors did you consider, since you got more

6 applicants than you needed? How did you decide

7 who got admitted and who didn't get in?

8 THE WITNESS: Well again, we looked at

9 popularity. We sampled the programming. We

10 liked to do a mix. So in addition to religion,

11 we got some distant learning. We got, as I

12 recall, a couple of music kind of travel

13 channels. So we -- so in addition to the mix, it

14 was popularity and how it looked. Some of them

15 just didn't look great.

16 JUDGE STRICKLER: So this is sort of

17 a baby, a sub-niche. In other words, it's

18 religious programming that will fulfill a

19 particular regulatory requirement, and within

20 this sub-sub-niche, you then used popularity

21 through ratings, to determine or buy, as I think

22 you mentioned as one of your viewership measures,

142

1 to determine which of the programs in this sub-

2 sub-niche are going to get the PIO designation

3 and get aired?

4 THE WITNESS: Yes.

5 JUDGE STRICKLER: And the ones that

6 you mention on page eight of your testimony,

7 there's the Easter Pageant from the Crystal

8 Cathedral. Was that a PIO?

9 THE WITNESS: So those were just --

10 I'm sorry I interrupted.

11 JUDGE STRICKLER: That's okay. Was

12 the Easter Pageant that you referenced from

13 Crystal Cathedral, was that one that received the

14 PIO designation?

15 THE WITNESS: That was a pay-per-view

16 event. So it was just a one-time show. We did

17 it every year, and the subscriber could click and

18 buy it for 3.99.

19 JUDGE STRICKLER: I understand. Does

20 that go towards the PIO designation or it

21 doesn't?

22 THE WITNESS: No.

143

1 JUDGE STRICKLER: Pay per view

2 doesn't apply towards that?

3 THE WITNESS: No.

4 JUDGE STRICKLER: Okay, I got it.

5 And how about the other ones you mentioned, the

6 specialty devotional programs. You mentioned the

7 church service from the University of Notre Dame.

8 Did that count towards it?

9 THE WITNESS: No. It needed to be a

10 24 by 7 channel. We called it a 24 by 7

11 turnaround. So it needed to be a fully owned

12 program channel.

13 JUDGE STRICKLER: So am I correct,

14 that none of the programs that you mention on

15 page eight were those that qualified for the PIO

16 designation?

17 THE WITNESS: Correct.

18 JUDGE STRICKLER: Okay, thank you.

19 JUDGE FEDER: I'm just trying to get

20 a handle on how carry one, carry all works. So

21 suppose in a particular DMA there were four local

22 channels. One opts for must-carry. Does that

144

1 have anything to do with the carry one, carry all

2 rule?

3 THE WITNESS: Yes. So let's say we

4 decide to go into Philadelphia. I give notice to

5 every station in Philadelphia, and half of them

6 elect must-carry, that I must carry them, and

7 then the other half elects retrans, and then I

8 would negotiate.

9 JUDGE FEDER: But you must negotiate

10 with them under carry one, carry all?

11 THE WITNESS: Yes. There was a good

12 faith negotiation standard.

13 JUDGE FEDER: And if there's a

14 holdout?

15 THE WITNESS: Then I don't have to

16 carry them.

17 JUDGE FEDER: Okay. So one station

18 can't hold up going into the DMA by holding out?

19 THE WITNESS: Correct, yes.

20 JUDGE FEDER: All right, thank you.

21 JUDGE BARNETT: Any follow up

22 questions?

145

1 MR. OLANIRAN: No, Your Honor.
 2 MR. MACLEAN: No.
 3 JUDGE BARNETT: Thank you, Ms. Berlin.
 4 THE WITNESS: Thank you.
 5 (Witness excused.)
 6 JUDGE BARNETT: It's time for our noon
 7 recess. We will be at recess for one hour.
 8 (Whereupon, the above-entitled matter
 9 went off the record at 11:57 a.m. and resumed at
 10 1:06 p.m.)
 11 JUDGE BARNETT: Mr. Boydston, you may
 12 call your first witness.
 13 MR. BOYDSTON: Your Honor, Independent
 14 Producers Group calls Raul Galaz.
 15 WHEREUPON,
 16 RAUL GALAZ
 17 was called as a witness by Counsel for the
 18 Independent Producers Group and, having been
 19 first duly sworn, assumed the witness stand, was
 20 examined and testified as follows:
 21 MS. PLOVNICK: Before we get started
 22 here, just for the record, MPAA has a motion to

146

1 strike that's directed at Mr. Galaz's testimony
 2 and many exhibits.
 3 And so I just wanted to put on record
 4 that there's some papers we filed on objection,
 5 but would you like me to say something when these
 6 are offered? Or is it just understood that that
 7 motion's been filed as we go through exhibits?
 8 JUDGE BARNETT: The only objections we
 9 want to hear are objections that are not in your
 10 papers.
 11 MS. PLOVNICK: All right, thank you,
 12 Your Honor. So just those objections are all
 13 made in my papers.
 14 JUDGE BARNETT: Okay.
 15 MR. MACLEAN: Your Honor, as I said
 16 yesterday, we do have objections that are made in
 17 the papers that we will be requesting a ruling
 18 here because it is prejudicial.
 19 Now, I mean I'll make the argument
 20 when the objection arises, but for some of the
 21 testimony that's being offered here, for some I
 22 have no problem with the judgments reserved.

147

1 For some, it's really prejudicial to
 2 admit it even provisionally at this time. I'll
 3 raise the objection though when it comes up.
 4 JUDGE BARNETT: Okay. Thank you.
 5 DIRECT EXAMINATION
 6 BY MR. BOYDSTON:
 7 Q Thank you, Your Honor. Good
 8 afternoon, Mr. Galaz. Could you please tell us
 9 your position with Independent Producers Group?
 10 A Currently, I call myself consultant
 11 because I'm no longer technically employed.
 12 Q Okay. And you're familiar generally
 13 with the matters surrounding these proceedings.
 14 Correct?
 15 A Clearly.
 16 Q Can I please ask you to take a look at
 17 what's been marked as Exhibit 1 in the IPG,
 18 excuse me, not one, 100, that is and 24.
 19 (Whereupon, the above-referred to
 20 document was marked as Independent Producers
 21 Group Exhibit No. 124 for identification.)
 22 JUDGE BARNETT: Before we go there,

148

1 Mr. Galaz, for the benefit of the court reporter,
 2 could you spell your first and last names,
 3 please?
 4 THE WITNESS: Certainly, R-A-U-L and
 5 G-A-L-A-Z.
 6 JUDGE BARNETT: Thank you.
 7 BY MR. BOYDSTON:
 8 Q And are you familiar with what's
 9 marked as Exhibit 124?
 10 A Yes I am.
 11 Q And what is it?
 12 A This is the exhibit that was submitted
 13 as part of IPG's direct statement wherein we
 14 identified the particular claimants on whose
 15 behalf we were representing, program claims and
 16 the particular years of representation.
 17 And to be more clear about that, years
 18 for which claim was made and that was applicable
 19 to retransmitted broadcasts that generate a
 20 retransmission royalty.
 21 Q And did you prepare this document?
 22 A Yes, I did.

UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress

In Re Distribution of 2003, 2005, 2006, 2007, 2008 and 2009 Cable Royalty Funds	Docket No. 2012-6 CRB CD 2004-2009 (Phase II)
In Re Distribution of 199, 2000, 2001, 2003, 2003, 2005, 2006, 2007, 2008 and 2009 Satellite Royalty Funds	Docket No. 2012-7 CRB SD 1999-2009 (Phase II)

SUPPLEMENTAL TESTIMONY OF TOBY BERLIN

In connection with the 1999-2009 cable and satellite royalty proceeding, I provided testimony regarding my experience at DIRECTV, and my opinion, based on my years of professional experience as Vice President of Programming Acquisition, about the importance of local ratings in assessing the value of programming within a category of programming geared to appeal to a particular base of subscribers. I have reviewed the Copyright Royalty Judges' order of May 4, 2016, which expressed concern that changes in the market and technical improvements emerging between the years 1999 and 2009 might have had an effect on local viewership of programs, and questioned if the habits described in data collected from 1999 – 2003 would continue through the 2004 – 2009 time period. I have also reviewed my prior written and oral testimony in this proceeding. I stand by the testimony I have already submitted, but provide this Supplemental Testimony to address the Judges' concerns expressed.

To my knowledge, the relationship between local and distant viewing on cable systems or satellite operations during the time period 1999-2009 was not something that was routinely measured. To my understanding, this is partly because of the inherent difficulty in measuring viewership of programs in geographic areas where they are not

locally broadcast, and partly because local ratings are such a widely used and accepted measure of popularity that there is little market for more refined data. My personal experience during the time period of 1999-2009 was that while there were significant developments in the consumer technology of the industry (such as advances in HD, DVR, and digital transmission), none of these changes affected the analytic process of anticipating content consumption habits of existing and future subscribers. Throughout this entire time period, nothing provided me with more insightful information to determine which stations to transmit to distant markets than the types of programs offered on the station, coupled with local Nielsen ratings.

In my fifteen years of experience at DIRECTV, I found that local ratings correlated well to interest in programs outside the local markets, and also to willingness of home owners, apartment renters, RV owners, etc., to subscribe to our services, with the important caveat that it is always necessary to offer a range of different kinds of programming to appeal to different groups of subscribers, and to give all subscribers a variety of popular programs to choose from. These facts remained true through the entire period from 1999-2009. The reasons are obvious, and well-known in the industry. Programs on a station that are popular in one market also tend to be popular in distant markets - especially in those distant markets where we judged the demand for a particular station's programming to be the highest. When we offered the stations carrying popular programs within a category of programs, we judged that we would receive more subscriptions from subscribers who were interested in that kind of programming.

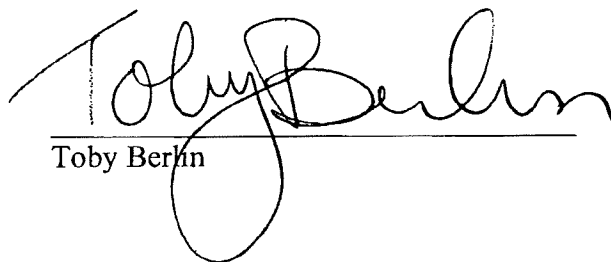
In short, program popularity was a reliable leading indicator of consumer happiness and operator success. I strived to ensure that DIRECTV offered the most

popular content available in a variety of program categories to support our primary goals of acquiring and retaining subscribers and ensuring maximum return on investment (including signal costs and copyright fees) for the signal. To do so, I relied on Nielsen data to guide my decisions as to how to value distant signals in unserved DMAs.

DECLARATION OF TOBY BERLIN

I declare under penalty of perjury that the foregoing Supplemental Testimony is true and correct and of my personal knowledge.

Dated: August 17, 2016



Toby Berlin

Toby Berlin – Bio

In her current role, Toby Berlin provides consulting expertise in the Cable/Satellite/MVPD/OTT universe including, high level negotiations, strategic planning, business development, financial and contractual support. She also advises on organizational structure, packaging, pricing, cost reduction, revenue growth, subscriber acquisition and retention, contract database, compliance, contractual negotiations and strategies and crisis management.

She serves as the Cable/Satellite/Retransmission Consent Advisor for multiple research firms to educate large institutional investors on industry. Most recently, Sony Interactive Entertainment Network America, LLC (SIENA) engaged her as a member of the Playstation VUE launch team, seeking her expertise on many facets of the TV distribution business including content acquisition (including pricing and packaging), organizational infrastructure, expansion planning and MSO/ISP & Telco partnerships. She has created the roadmap for news-based cable network for expansion into airlines, hotels, motels and office buildings as well as crafted a successful negotiation strategy for cable networks seeking to extend contractual relationship with distributors. Finally, she assists Programmers in the sale, acquisition and merger of assets through outright purchase or “buy & build” strategy; in expansion of subscriber base.

In her previous role, Berlin was responsible for aspects of programming acquisitions for the DIRECTV service including all networks available on DIRECTV's Spanish-language package DIRECTV en Español, DIRECTV's WorldDirect international programming packages, shopping channels, adult programming, DIRECTV's airborne platforms on Continental, JetBlue and Frontier airlines, as well as the Sonic Tap music channels available on the DIRECTV platform. After the passing of the Satellite Home Viewer Improvement Act of 1999 (SHVIA), which gave DIRECTV the rights to broadcast local channels across the United States, she led the efforts to bring these channels to homes across the country. Berlin negotiated the local into local rights for DIRECTV, and successfully launched the broadcast of local channels in over 143 DMAs since January 2000.

In 2006, she conceived, developed and directed the execution team for DIRECTV's Titanium package. This upscale service gives VIP subscribers access to every channel and every Pay Per View event and movie broadcast on the DIRECTV service for a single yearly fee, and debuted to a chorus of positive publicity singling out the platform's uniqueness and exclusivity.

Berlin was also the president emeritus and founder of the Women's Leadership Exchange at DIRECTV. This internal group enhanced the experiences of female employees at DIRECTV through monthly seminars with industry executives, networking sessions, Toastmasters club, a mentoring program, a working mothers group, and quarterly newsletters.

Berlin is equally adept at handling sponsorship deals. As founding organizing committee member for DIRECTV's annual Beach Bowl and VIP "After Party" aligned with Super Bowl, she negotiated network and product sponsorships, celebrity, athlete and entertainer participation. 2013 celebrities included Mark Cuban and Justin Timberlake. The event is one of the most anticipated events of the Super Bowl weekend.

Prior to her work at DIRECTV, she served as executive director of The Learning Annex, where she was responsible for the creation of a monthly catalog of over 250 classes featuring top best-selling authors and personalities.

Berlin holds a bachelor's degree from the University of Miami in Coral Gables, Fla. and a law degree from Southwestern University of Law in Los Angeles. Berlin lives with her family in Santa Monica, Calif., where she is active in the community and in 2010, served as a board member for the Santa Monica Pier.

Certificate of Service

I hereby certify that on Friday, December 29, 2017 I provided a true and correct copy of the Written Direct Statement to the following:

National Public Radio, Inc. (NPR), represented by Gregory A Lewis served via Electronic Service at glewis@npr.org

Multigroup Claimants, represented by Brian D Boydston served via Electronic Service at brianb@ix.netcom.com

Canadian Claimants Group, represented by Lawrence K Satterfield served via Electronic Service at lksatterfield@satterfield-pllc.com

Spanish Language Producers, represented by Brian D Boydston served via Electronic Service at brianb@ix.netcom.com

American Society of Composers, Authors and Publishers (ASCAP), represented by Sam Mosenkis served via Electronic Service at smosenkis@ascap.com

MPAA-represented Program Suppliers, represented by Lucy H Plovnick served via Electronic Service at lh@msk.com

Broadcast Music, Inc. (BMI), represented by Janet Fries served via Overnight Service

SESAC, Inc., represented by John C. Beiter served via Electronic Service at jbeiter@lsglegal.com

Public Broadcasting Service (PBS), represented by Lindsey L. Tonsager served via Electronic Service at ltonsager@cov.com

Joint Sports Claimants, represented by Robert A Garrett served via Electronic Service at robert.garrett@apks.com

National Association of Broadcasters (NAB), represented by David J Ervin served via Electronic Service at dervin@crowell.com

Signed: /s/ Matthew J MacLean